EDITOR'S NOTE

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o. 84-744-CFY
tatus: GRANTED

Title: Lnitec States, Petitioner
v.
James C. Lane anc Dennis R. Lane

ocketed:
ovember 6, 1984

Court: Lnitec States Court of Acceals for the Fifth Circuit

ice:
84-963

Counsel for petitioner: Solicitor Gereral

Counsel for responcent: Brown, Clifford W.

ntry	Date	Note	Proceedings and Orcers
1	Oct 10 1984		Application for extension of time to file petition and order granting same until November 20, 1984 (White, October 11, 1984).
2	Nov 6 1984	G	Petition for writ of certiorari filec.
3	Dec 7 1984		Brief of respondents James C. Lane, et al. in opposition filec.
4	Dec 12 1984		DISTRIBUTED. January 11, 1985
5	Jan 2 1985		REDISTRIBUTED. January 18, 1985
7	Feb 1 1985		REDISTRIBUTED. February 15, 1985
8	Feb 1 1985		REDISTRIBUTED. February 15, 1985
9	Feb 19 1985		Petition GRANTED. The case is consoliatec with 84-963, anc a total of one hour is allotted for cral argument. Justice Powell OLT.
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10	Feb 27 1985		Record filed.
11	Feb 27 1985		Certifiec copy of original record & C.A. proceedings received. (Bcx).
12	Apr 1 1985		Joint appendix filed. VIDED.
14	Apr 2 1985		Order extending time to file brief of petitioner on the merits until May 6, 1985.
15	Apr 26 1985		Brief of petitioner United States filed. VIDED.
17	May 24 1985		Order extending time to file brief of respondent on the merits until June 28, 1985.
18	Jun 28 1985		Brief of respondents James C. Lane, et al. filed. VIDED.
19	Jul 18 1985		SET FOR ARGUMENT, Wednesday, October 9, 1985. This case is consolicated with No. 84-963. (2nc case) (1 hour).
20	Aug 7 1985		CIRCULATED.
21	Aug 28 1985	X	Reply brief of petitioner United States filec. VIDED.
22	Oct 9 1985		ARGUED.

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84-744

No.

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES C. LANE AND DENNIS R. LANE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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44 pp

QUESTION PRESENTED

Whether the court of appeals erred in reversing respondents' convictions on the basis of misjoinder under Rule 8 of the Federal Rules of Criminal Procedure without determining whether the misjoinder constituted harmless error.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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UNITED STATES OF AMERICA, PETITIONER

v.

JAMES C. LANE AND DENNIS R. LANE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 735 F.2d 799.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 21a) was entered on June 18, 1984. A petition for rehearing was denied on August 22, 1984 (App., *infra*, 22a-23a). On October 11, 1984, Justice White extended the time in which to file a petition for a writ of certiorari to November 20, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULES INVOLVED

Fed. R. Crim. P. 8 provides:

> (a) **Joinder of Offenses.** Two or more offenses may be charged in the same indictment or informa-

tion in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Fed. R. Crim. P. 52(a) provides:

Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Texas, respondent James C. (J.C.) Lane was convicted on four counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of conspiracy, in violation of 18 U.S.C. 371. He was sentenced to a total of seven years' imprisonment and fined $9,000. His son, respondent Dennis Lane, was convicted on three counts of mail fraud, one count of conspiracy, and one count of perjury, in violation of 18 U.S.C. 1623. He was sentenced to custody under the Youth Corrections Act, 18 U.S.C. 4216, 5010(b). The court of appeals reversed (App., *infra*, 1a-20a).

1. Each respondent was charged in five counts of a six-count indictment encompassing three arson-for-profit schemes. Count 1 charged J.C. Lane with mail fraud in connection with a 1979 fire in a restaurant in Amarillo, Texas. Counts 2-4 charged both respondents with mail fraud in connection with a 1980 fire in a duplex in Amarillo. Count 5 charged both respondents

with conspiracy in connection with the planned arson of a flower shop in 1980 in Lubbock, Texas. Count 6 charged Dennis Lane with perjury before a grand jury investigating the flower shop scheme in 1981. Respondents' motions for severance before and during trial were denied. They were tried jointly and convicted on all counts. App., *infra*, 8a.

a. The evidence at trial showed that J.C. Lane and three partners opened the El Toro restaurant in Amarillo in the summer of 1978. They leased the building and restaurant equipment for a term of five years. App., *infra*, 2a. A clause in the lease provided that it would be terminated under certain circumstances in the event of fire (Tr. 34-37; GX 1). The restaurant never operated at a profit, suffering declining sales after September 1978 and sustaining losses of $20,000 during 1978 and $9,000 during the two months it operated in 1979 (App., *infra*, 2a, 3a n.1).

J.C. Lane purchased fire insurance for the restaurant in November 1978, covering the contents and improvements for $10,000 each and providing a maximum of $18,000 for business losses. At about the same time he contacted Sidney Heard, a professional "torch," asking him how much it would cost to burn the building and stating that he wanted to get out of his lease and the partnership.[1] Heard set a fire in the building on February 27, 1979, which did not destroy it but did damage its contents. App., *infra*, 2a.

The insurance company settled with Lane for $10,000 on the building's contents and $9,200 on the improvements. On June 1, 1979, the insurance adjustor mailed a memorandum to the company's regional headquarters

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[1] Evidence of Heard's prior dealings with J.C. Lane in connection with two other arsons was excluded by the trial court (Tr. 229, 370-376). Heard, who testified at trial, had entered into a plea agreement with the government (Tr. 265-275, 605-606).

concerning settlement of Lane's business-interruption claim. Included with the memorandum was a list of the restaurant's monthly income and expenses submitted by Lane, falsely claiming a net monthly profit of $2,500. This mailing was charged in count 1 of the indictment. On November 1, 1979, the claim was settled for $2,700. App., *infra*, 2a-3a.

Dennis Lane was not involved in the restaurant arson. At the time the evidence relating to this count was received, the trial judge instructed the jury that the evidence was not to be considered against him (Tr. 95-96). The judge repeated this instruction in her final charge, together with an instruction regarding the separate consideration to be given each defendant and each count (Tr. 984-985).

b. In early 1980, J.C. Lane hired Heard to set fire to a duplex that Lane was moving to a vacant lot in Amarillo. The duplex was owned by Dennis Lane and Andrew Lawson, doing business as L & L Properties. On January 22, 1980, J.C. Lane obtained a $35,000 fire insurance policy on the building, which had been purchased for $500. The duplex was burned on May 1, 1980, by Marvin McFarland, an employee of Heard's. App., *infra*, 3a-4a.

Shortly after the fire, Dennis Lane signed an initial proof-of-loss form claiming $7,000 and stating that the "loss did not originate by any act, design or procurement on the part of your insured or this affiant" and that "no attempt to deceive [the] company as to the extent of the loss has been made" (App., *infra*, 4a). Dennis Lane submitted additional proof-of-loss forms later in May 1980 claiming $5,000 for repairs to the building. He also submitted what purported to be invoices for materials used in making repairs. Certain of the repairs had in fact not been performed; the invoices were fabricated by J.C. Lane together with Heard and his secretary. The total amount paid on the policy was

over $24,000. The mailings of the proof-of-loss forms and invoices were charged in counts 2 through 4 of the indictment. *Id.* at 4a-5a.

c. At a meeting with respondents and Lawson several weeks after the duplex fire, Heard proposed that they establish and burn a phony flower shop in Lubbock. Respondents agreed to participate in the plan. Heard's associate William Lankford, who operated L & L Designs, an artificial-flower business in Amarillo, agreed to stock the Lubbock shop with old flowers and broomweed. Heard and Dennis Lane picked out a suitable building in July 1980, which Lankford stocked in August. Lankford prepared fictitious invoices for merchandise purportedly delivered to the shop. In November 1980, J.C. Lane insured the contents of the shop for $50,000. Heard was later arrested and Lankford questioned with respect to an unrelated crime, and the planned arson of the flower shop never took place. In March 1981, a newspaper article connected Dennis Lane to a scheme to burn the shop with Heard. The same day, J.C. Lane cancelled the insurance policy on the shop. App., *infra*, 5a-7a. In May 1981, Dennis Lane appeared before a grand jury investigating Heard. He testified that Heard had nothing to do with the flower shop or with his own dealings with Lankford. *Id.* at 7a-8a.

2. The court of appeals reversed respondents' convictions, holding (App., *infra*, 9a) that count 1 "should not have been joined with the others [under Fed. R. Crim. P. 8(b)] because it was not part of the same series of acts or transactions as Counts 2 through 6." The court reasoned that the restaurant fire was entirely separate from the other crimes and that it was not linked to them by any common scheme or plan (App., *infra*, 9a-13a). The court did conclude, however, that counts 2 through 6 were properly joined (*id.* at 13a).

The court refused to consider the government's argument that the error, if any, was harmless. Stating only that "Rule 8(b) misjoinder is prejudicial *per se* in this circuit" (App., *infra*, 13a) and that it is "inherently prejudicial" (*id.* at 10a), the court remanded for new trials on all counts.[2] Under the court's ruling (*id.* at 13a), respondents on remand may be tried jointly on counts 2 through 6 with a separate trial for J.C. Lane on count 1.[3] The court denied the government's petition for rehearing without opinion (App., *infra*, 22a-23a).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals reversing respondents' convictions without determining whether the improper joinder of count 1 constituted harmless error conflicts with Rule 52(a) of the Federal Rules of Criminal Procedure, with the decisions of this Court recognizing that appellate courts have a duty to consider whether any trial error was harmless, and with the decisions of several courts of appeals refusing to reverse convictions on the basis of misjoinder in the absence of a showing of prejudice to the defendants. In view of the substantial number of cases raising joinder questions, the decision below entails serious implications for the administration of criminal justice in the federal courts. Accordingly, review by this Court is warranted.[4]

1. Rule 52(a) of the Federal Rules of Criminal Procedure provides that "[a]ny error * * * which does not affect substantial rights shall be disregarded." In *United States* v. *Hasting*, No. 81-1463 (May 23, 1983), this Court made it clear that "it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless" (slip op. 9). See also, *e.g.*, *Brown* v. *United States*, 411 U.S. 223, 230-232 (1973); *Milton* v. *Wainwright*, 407 U.S. 371 (1972); *Harrington* v. *California*, 395 U.S. 250 (1969); *Chapman* v. *California*, 386 U.S 18 (1967); *Kotteakos* v. *United States*, 328 U.S. 750 (1946). The Court in *Hasting* held that the requirement of appellate "consideration of the entire record prior to reversing a conviction" applies to all "errors that may be harmless" (slip op. 10 n.7). A violation of Rule 8's joinder standards surely falls within this category, as we argue below (pages 10-12, *infra*). The decision of the court of appeals thus is in clear violation of the requirement that any adjudication of error be accompanied by a harmless-error analysis.[5]

The approach adopted by the court below directly conflicts with the rule in six circuits, which take the view that misjoinder under Rule 8[6] may constitute

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[2] The court rejected respondents' challenge to the sufficiency of the evidence (App., *infra*, 13a-20a).

[3] Although the court did not address the issue, it seems clear that, under Rule 8(a), count 1 could properly be joined with counts 2 through 5 at a trial of J.C. Lane alone. Accordingly, each respondent may be tried on all his charges at a trial separate from that of the other respondent.

[4] Although we believe, as we argued to the court of appeals, that the joinder was permissible here, we are not presenting this largely factual question in the petition.

[5] The decision below also violates 28 U.S.C. 2111, which provides that "[o]n the hearing of any appeal * * *, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

[6] In considering whether to apply the harmless-error rule, it should make no difference whether the joinder was of offenses under Rule 8(a) or of defendants under Rule 8(b). See, *e.g.*, *United States* v. *Ajlouny*, 629 F.2d at 843 (treating issue as one under Rule 8 and citing precedents addressing both subsections of the Rule). We note that, although the language of the Rule may support a different result, the courts have generally applied Rule 8(a) only to single-defendant indictments and not to the joinder of counts charging one defendant in the context of a multi-defendant indictment. See 1 C. Wright, *Federal Practice and Procedure: Criminal* § 143, at 479 & n.1 (2d ed. 1982)

harmless error. See, *e.g.*, *United States* v. *Ajlouny*, 629 F.2d 830, 843 (2d Cir. 1980), cert. denied, 449 U.S. 1111 (1981); *United States* v. *Seidel*, 620 F.2d 1006 (4th Cir. 1980); *United States* v. *Hatcher*, 680 F.2d 438, 442 (6th Cir. 1982); *United States* v. *Varelli*, 407 F.2d 735, 747-748 (7th Cir. 1969) (dictum); *United States* v. *Martin*, 567 F.2d 849, 854 (9th Cir. 1977); *Baker* v. *United States*, 401 F.2d 958, 972-974 (D.C. Cir. 1968).[7] The other circuits deem misjoinder prejudicial per se and not subject to the harmless-error rule. See, *e.g.*, *United States* v. *Turkette*, 632 F.2d 896, 906 & n.35 (1st Cir. 1980), rev'd on other grounds, 452 U.S. 576 (1981); *United States* v. *Graci*, 504 F.2d 411, 414 (3d Cir. 1974) (dictum); *United States* v. *Bova*, 493 F.2d 33 (5th Cir. 1974); *United States* v. *Bledsoe*, 674 F.2d 647, 654, 657-658 (8th Cir.), cert. denied, 459 U.S. 1040 (1982); *United States* v. *Eagleston*, 417 F.2d 11, 14 (10th Cir. 1969); *United States* v. *Ellis*, 709 F.2d 688, 690 (11th Cir. 1983). This even split among the circuits plainly warrants resolution by this Court.

2. By its terms, the harmless-error rule applies to "[*a*]*ny* error * * * which does not affect substantial rights." Fed. R. Crim. P. 52(a) (emphasis added). The rule makes no exception for claims of improper joinder, and no sound reason supports the creation of such an

(citing cases); 8 *Moore's Federal Practice* ¶ 8.05[1], at 8-19 (2d ed. 1982).

[7] Most of these courts had previously taken the view that misjoinder is prejudicial per se. See, *e.g.*, *Ingram* v. *United States*, 272 F.2d 567 (4th Cir. 1959); *United States* v. *Sutton*, 605 F.2d 260, 272 (6th Cir. 1979);*United States* v. *Gougis*, 374 F.2d 758, 762 (7th Cir. 1967); *Metheany* v. *United States*, 365 F.2d 90, 94-95 (9th Cir. 1966), cert. denied, 393 U.S. 824 (1968); *Ward* v. *United States*, 289 F.2d 877, 878 (D.C. Cir. 1961). The Second Circuit has from the beginning adhered to its current position that misjoinder may be harmless. See *United States* v. *Granello*, 365 F.2d 990, 995 (2d Cir. 1966) (Friendly, J.), cert. denied, 386 U.S. 1019 (1967).

exception. On the contrary, to require a new trial even though the asserted misjoinder was harmless error would be inconsistent with the beneficial purposes of both Rule 52[8] and Rule 8.[9] In *Schaffer* v. *United States*, 362 U.S. 511, 517 (1960), the Court seemingly recognized that the harmless-error rule is applicable to improper joinder, but it found that the "rule * * * is not even reached in the instant case, since here the joinder was proper under Rule 8(b) and no error was shown." See *United States* v. *Granello*, 365 F.2d 990,

[8] See *Hasting*, slip op. 10 ("The goal * * * is 'to conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error,'" quoting R. Traynor, *The Riddle of Harmless Error* 81 (1970)); *Kotteakos* v. *United States*, 328 U.S. at 758-760. In the context of a criminal prosecution, the harmless-error rule recognizes that "justice, though due to the accused, is due the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934) (Cardozo, J.). See also *Bruton* v. *United States*, 391 U.S. 123, 135 (1968) ("'A defendant is entitled to a fair trial not a perfect one,'" quoting *Lutwak* v. *United States*, 344 U.S. 604, 619 (1953)).

[9] See, *e.g.*, *Bruton* v. *United States*, 391 U.S. at 134 (joint trials "conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial"); *Parker* v. *United States*, 404 F.2d 1193, 1196 (9th Cir. 1968), cert. denied, 394 U.S. 1004 (1969) (joinder "expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries, and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once"); *United States* v. *Werner*, 620 F.2d 922, 928 (2d Cir. 1980) ("trial convenience and economy of judicial and prosecutorial resources [are] considerations of particular weight when the Government and the courts have been placed under strict mandate to expedite criminal trials [under the] Speedy Trial Act").

995 (2d Cir. 1966), cert. denied, 386 U.S. 1019 (1967). See also *Kotteakos* v. *United States*, 328 U.S. at 775 (harmless-error and joinder rules "must be construed and applied so as to bring them into substantial harmony, not into square conflict").[10]

In *Hasting*, the Court noted that "certain errors may involve 'rights so basic to a fair trial that their infraction can never be treated as harmless error'" (slip op. 9 n.6, quoting *Chapman* v. *California*, 386 U.S. at 23). Such fundamental rights include the right to counsel[11] and the right to an impartial judge.[12] The joinder standards of Rule 8, which are not even of constitutional magnitude,[13] obviously do not rise to the level of

[10] *McElroy* v. *United States*, 164 U.S. 76 (1896), while often cited for the proposition that misjoinder is prejudicial per se, in fact does not establish such a rule. In that case, which was decided prior to either the adoption of the Federal Rules of Criminal Procedure in 1946 or the enactment of the harmless-error statute in 1919 (see Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181, 28 U.S.C. (1946 ed.) 391), the government argued that the finding of misjoinder did not require reversal of the convictions of those defendants who had been charged in all counts "because there is nothing in the record to show that they were prejudiced or embarrassed in their defense by the course pursued" (164 U.S. at 81). The Court rejected this argument on the ground that "[i]t cannot be said * * * that all the defendants may not have been embarrassed and prejudiced in their defence, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions" (*ibid.*). Thus, *McElroy* rests upon the conclusion that the misjoinder there might have been prejudicial and so could not be presumed harmless. See *United States* v. *Granello*, 365 F.2d at 995.

[11] *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

[12] *Tumey* v. *Ohio*, 273 U.S. 510 (1927).

[13] "[N]o federal court has raised misjoinder to an error of constitutional dimension." Note, *Harmless Error and Misjoinder Under the Federal Rules of Criminal Procedure: A Narrowing Division of Opinion*, 6 Hofstra L. Rev. 533, 540 (1978) (footnote omitted). See, *e.g.*, *United States* v. *Seidel*, 620 F.2d at 1013

these fundamental rights. Nor is the prejudice that may result from misjoinder so difficult to ascertain that it should be presumed: Rule 14[14] provides for an inquiry by the trial court into the possible prejudice flowing from joint trials, and there is no reason why the reviewing court cannot undertake the same examination with respect to Rule 8. Indeed, those circuits that have applied Rule 52(a) to misjoinder have engaged in the same sort of careful inquiry into the possibility of prejudice that has characterized the proper application of the harmless-error rule in other contexts. See, *e.g.*, *United States* v. *Seidel*, 620 F.2d at 1009-1011; *United States* v. *Turbide*, 558 F.2d 1053, 1051-1063 (2d Cir.), cert. denied, 434 U.S. 934 (1977). See also 8 *Moore's Federal Practice* ¶ 8.05[1], at 8-18 to 8-19 (2d ed. 1982) (application of Rule 52(a) to misjoinder "is acceptable and even desirable * * *[;] [d]efendants will suffer * * * only if, in

(misjoinder only "a violation of a mere procedural rule") (footnote omitted). While joinder may of course give rise to constitutional violations (see, *e.g.*, *Bruton* v. *United States*, *supra*), this Court has not suggested that a violation of Rule 8 in itself contravenes any constitutional provision. See generally *Schaffer* v. *United States*, *supra*; *Bruton*, 391 U.S. at 131 n.6 (joinder rules designed to achieve economies withut violating rights of defendants). The Court's discussion of the harmless-error standard for nonconstitutional violations in *Kotteakos* v. *United States*, *supra*, which raised joinder as well as variance issues (328 U.S. at 756 n.6, 774), further suggests that improper joinder does not violate the Constitution.

[14] Fed. R. Crim. P. 14 provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver in the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at trial.

the name of 'efficiency,' the [harmless-error] doctrine is not carefully and strictly construed").

In support of the view that the harmless-error standard is inapplicable to misjoinder, it has been argued that application of Rule 52(a) in these circumstances would effectively make Rule 8 redundant with Rule 14, which expressesly addresses the issue of prejudicial joinder (see note 14, *supra*). See, *e.g.*, 1 C. Wright, *Federal Practice and Procedure: Criminal* § 145, at 529-530 (2d ed. 1982). But this objection misses the crucial fact that the rules are addressed to procedures in the district court, where they are quite clearly distinct: Rule 8 *requires* the court to grant a motion for severance unless its standards are met, even in the absence of prejudice, while Rule 14 gives the court *discretion* to grant such a motion in the case of joinder that, though proper under Rule 8, is prejudicial. This difference goes to the queston whether there has been error at all, not to the quite distinct question whether the error requires setting aside the convictions; consequently, it is wholly fallacious to contend that the difference in the rules is eviscerated simply because, on appeal, a reviewing court will not set aside a conviction for a violation of Rule 8 in the absence of prejudice.

Moreover, even when Rule 52(a) is applied to violations of Rule 8, an important distinction remains between appellate review of the denial of Rule 8 motions and of those brought under Rule 14: the former are reviewed as a matter of law, with affirmance proper only if the government has carried the burden of establishing the harmlessness of any error, while the latter are reviewed under the highly deferential abuse of discretion standard, with the defendant having to shoulder the burden of a clear demonstration of substantial prejudice. For these reasons, Rule 14 cannot be said to create an implicit exception to the application of the harmless-error standard with respect to misjoinder. See *United States* v. *Seidel*, 620 F.2d at 1014-1015; *United States* v. *Werner*, 620 F.2d 922, 926 (2d Cir. 1980); *Baker* v. *United States*, 401 F.2d at 973; *United States* v. *Granello*, 365 F.2d at 995.

3. While this court, if it agrees with us that misjoinder is subject to harmless-error evaluation, may prefer to remand to the court of appeals for consideration of the harmfulness of the misjoinder of count 1, we believe there can be no question that it did not materially prejudice respondents' rights in the circumstances of this case.[15] First, the error in joining count 1 with the others was at most exceedingly marginal. Although there may not have been a single overarching conspiracy encompassing all three arson schemes, their close relation in terms of time, method, and participants suggests that it was only the court of appeals' narrow reading of Rule 8 that resulted in its conclusion (Pet. App. 9a-13a) of misjoinder here. Second, the testimonial and documentary evidence against respondents was overwhelming and countered by little more than Dennis Lane's denials and J.C. Lane's character defense. There is simply no reasonable probability in light of the evidence that the joinder of count 1 contributed to respondents' convictions. Finally, the new trials of respondents would be so substantially similar to the trial that they have already had that any conclusion of prejudice can only be deemed speculative. At a joint trial of counts 2 through 6, evidence of the first arson would still be admissible to establish J.C. Lane's intent or for similar purposes under Fed. R. Evid. 404(b). Respondents would receive limiting instructions just as they did at the first trial (see page 4, *supra*). Any possibility of transferance of guilt is remote in light of the substantial involvement of both respondents and would not in

[15] Because violation of Rule 8 is not an error of constitutional dimension (see note 13, *supra*), the harmfulness of the error in this case is to be assessed under the normal standard of *Kotteakos* (see 328 U.S. at 764-765) rather than under the strict reasonable doubt standard established by *Chapman* for constitutional violations.

any event be reduced on joint retrial. Finally, reversal of J.C. Lane's convictions on counts 2 through 5 is wholly unsupportable, as they could have been tried with count 1 or with count 6; surely no demonstrable prejudice arose simply because they were tried with both of these counts.

Respondents were convicted following a lengthy trial at which the government presented 29 witnesses and more than 100 exhibits. The court of appeals reversed on a technical violation of the joinder requirements without any determination of the harmfulness of the error. At a time when the criminal justice system is already overburdened, such a result, which does nothing to contribute to the fairness of the process, makes little sense indeed. A substantial proportion of prosecutions—all except those based on single-count, single-defendant indictments—raise joinder questions. In view of the importance of the issue and the clear split among the circuits, review by this Court would contribute to the fair, uniform and efficient administration of criminal justice in the federal courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1984

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

No. 83-1742

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

JAMES C. LANE AND DENNIS R. LANE,
DEFENDANTS-APPELLANTS.

JUNE 18, 1984

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

Before GOLDBERG, RUBIN and REAVLEY, *Circuit Judges.*

GOLDBERG, *Circuit Judge:*

James C. ("J.C.") Lane and Dennis Lane were indicted in multiple counts for mail fraud, conspiracy, and perjury. J.C. alone was indicted in Count 1 for mail fraud in connection with a 1979 fire at a restaurant in Amarillo, Texas. J.C. and Dennis were both indicted in Counts 2 through 4 for various acts of mail fraud related to a 1980 fire at a duplex in Amarillo. They were also both indicted in Count 5 for conspiracy to commit mail fraud in connection with a fire at a Lubbock, Texas flower shop. Dennis alone was indicted in Count 6 for perjury before a Grand Jury. We hold that Count 1 was improperly joined with the other counts pursuant to

Fed.Rule Civ. [*sic*] Proc. 8(b). Therefore, we reverse and remand for new trials.

FACTS

A. The El Toro Restuarant Fire

In the summer of 1978, J.C. Lane opened a Mexican restaurant in Amarillo, Texas. J.C., Jimmy Lane, Bill Dale, and Jack Stotts (a cook) were partners in the business. They leased the building for a term of five years and obtained considerable restaurant equipment. The restaurant never operated at a profit, however, and suffered declining gross sales after September, 1978.

In November, J.C. Lane purchased fire insurance on the restaurant from the Transamerica Insurance Group. He insured the contents of the restaurant ($10,000.00) as well as improvements ($10,000.00). He also insured against business losses resulting from the fire ($6,000.00 per month for three months). At about the same time, he contacted Sidney Heard, a professional "torch." Lane hired Heard to burn the building, telling Heard that he wanted to get out of his lease as well as his partnership with the cook.

On February 27, 1979, Heard entered the building and set a fire near the electrical box in the kitchen. The fire did not destroy the building, but the contents suffered smoke damage. After the fire, David Lard, an insurance adjustor for Transamerica, viewed the premises with Lane. Lane showed him where the "electrical" fire had started. The contents portion of the policy was settled for the full amount, $10,000.00. On April 23, 1979, Lard issued a draft for the sum to the El Toro restaurant. On May 3, 1979, he issued a second draft for $9,213.78, covering the "betterments and improvements" portion of the policy.

Finally, on June 1, 1979, Lard mailed a memorandum to officials at Transamerica's regional headquarters in Dallas. He requested their advice on settling El Toro's

claim under the "business interruption/loss of earnings" portion of the policy. Included with the memo was a list of monthly income and expenses for the El Toro Restaurant submitted by J.C. Lane. The list claimed a monthly net profit of $2,537.64, reportedly based on average profits between September and December, 1978.[1] This mailing is set forth in Count 1 of the indictment, which charges mail fraud. The claim was settled for $2,699.00; and on November 1, 1979, Lard issued a draft in that amount made out to the El Toro Restuarant.

B. The Duplex Fire

Sometime in early 1980, J.C. Lane met with Sidney Heard again. Lane advised Heard that he had bought a duplex for $500.00 and was moving it to a vacant lot at 1105 South Jackson Street in Amarillo. Lane offered to hire Heard to burn the building. A few weeks later, Heard, having inspected the property, accepted Lane's offer. Heard recommended that they pile scrap molding inside the building to fuel the flames; and in time, he did move molding into the duplex.

On January 22, 1980, J.C. Lane obtained a $35,000.00 fire policy on the duplex from the Trinity Universal Insurance Company. The policy listed the property as owned by L & L Properties, a partnership composed of Dennis Lane and Andrew Lawson. The duplex policy was added to a preexisting policy for other properties held by the partnership.

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[1] Tax records showed that the restaurant actually suffered a loss of $22,258.42 during the period between August and December, 1978. *See* Trial Transcript at 149.

Lane did not attempt to average the "profits" earned during the first two months of 1979. Rather, he reported that all 1979 records were destroyed in the fire. Tax records for that period did survive, however, and show a loss of about $9,000.00 during January and February, 1979.

Heard instructed his employee, Marvin McFarland, to burn the duplex. Heard was planning a trip to the Bahamas and wanted the fire to take place while he was out of the country. On May 1, 1980, the duplex burned.

Following the fire, William Liles, an adjustor for Trinity Universal, inspected the property; and on May 9, 1980, Liles issued a draft in the amount of $7,000.00 payable to Dennis Lane and Andrew Lawson doing business as L & L Proprties.[2] At the same time, Dennis Lane and Lawson signed a Proof of Loss form which stated that the "loss did not originate by any act, design or procurement on the part of your insured or this affiant." *See* Government's Exhibit 34-E. The "Proof of Loss" also stated that "no attempt to deceive [the] company as to the extent of the loss has been made." *Id.* The amount claimed on the Proof of Loss was $7,000.00. On May 15, 1980, Liles mailed to the company's headquarters in Dallas a report on repair costs at the duplex along with the Proof of Loss, photographs, and a repair estimate of about $14,000.00 provided by Dennis Lane.

On May 21 and 30, Liles issued additional drafts to the insured for $2,000.00 and $3,000.00 respectively, as the cost of repairs mounted up. Dennis Lane submitted an additional Proof of Loss corresponding to each payment. These documents made the same representations as the initial Proof of Loss. The record does not reveal when Dennis Lane submitted these additional forms, but Liles mailed the $2,000.00 Proof of Loss to Dallas on May 25, along with a memorandum indicating that the repairs were in progress and had exceeded the initial $7,000.00 advanced. On August 6, he mailed an-

[2] The check was also made payable to F.J. Corbin, a mortgagee on the property. Under the policy, Trinity Universal was required to pay the mortgagee as well as the property-owner. *See* Appellee's Brief at 14, n.1. Apparently, Corbin was not involved in the arson.

other progress report, the $3,000.00 Proof of Loss, and an additional Proof of Loss and claim for $2,000.00.[3] The $7,000.00 Proof of Loss and report mailed on May 15 are the subject of Count 2; the two Proofs of Loss and the memo mailed on August 6 are the subject of Court 3.

On September 16, 1980, Liles issued yet another draft, this one for $12,250.00, representing final settlement of the claims and bringing the total amount paid to $24,250.00. On September 18, Liles mailed a memorandum to Dallas explaining the high total cost of restoration. He enclosed a number of invoices supplied by Dennis Lane. Again, it is not clear when Dennis had delivered the documents. The invoices listed various materials and furniture (e.g., mahogany trim, plywood, door jambs, a bathtub) purportedly bought by L & L Properties to repair and refurbish the duplex. In truth, the invoices had been fabricated by J.C. Lane, Sidney Heard, and Heard's secretary. These invoices and Lile's memorandum form the basis for Count 4.

C. The Lubbock Flower Shop Conspiracy

Several weeks after the duplex fire, Sidney Heard visited J.C. Lane's office to collect his payment. J.C., Dennis Lane, and Andrew Lawson were present; and the men began to discuss the duplex. Heard indicated that he did not want to talk in front of Lawson, but Dennis assured him that Lawson was "all right . . . he's my partner and he knows what's going on." Trial Transcript at 252. Heard then told them that he was thinking of going into the flower shop business if they were interested. If they would put up $5,000.00 and cover the rent and insurance on the building, he would take care of the "torch," and a man he knew would supply

[3] It is not clear from the record whether this claim is the same as that represented by the Proof of Loss mailed on May 25. *See infra* note 10.

flowers to outfit the shop. He wanted to set up the shop in Lubbock. Dennis and J.C. liked the idea; and J.C. told Heard to contact them when he had picked out a building.[4]

After the meeting, Heard contacted William Lankford who already ran an artificial flower business in Amarillo (L & L Designs). Lankford agreed to stock the proposed Lubbock shop with old flowers and broomweed. Lankford and Heard planned to insure the contents of the shop for about $50,000.00. They would split $20,000.00 of the proceeds. This cut would be reflected by a note payable to Lankford's company from Dennis Lane.

Later, in June, 1980, Heard introduced Lankford to Dennis Lane. Heard and Dennis had come to Lankford's existing flower shop to see how such a business is run and what kind of supplies are necessary. They did not actually discuss the planned arson at the time because other employees were in the shop.

In July, 1980, Heard began looking for a suitable building to rent for the proposed shop. He and Dennis Lane inspected a building at 3602 Avenue A in Lubbock on July 10. Heard felt that it was a good building to burn; and Dennis put down a deposit on the property. He and Heard returned to Amarillo and, before parting, Dennis gave Heard a $5,000.00 check drawn on the L & L Properties account, payable to L & L Designs. He noted on the check that the payment was for the "first shipment of flowers per invoice." *See* Government Exhibit 30.

Around late August, Lankford delivered some cut silk flower arrangements and processed broomweed to the building in Lubbock. Dennis Lane met him there and unloaded the van while Lankford arranged the

[4] Lawson said that he was about to move to the Midland-Odessa area and would like to set up a similar arrangement there if the Lubbock deal was successful.

flowers inside the building. After returning to Amarillo, Lankford prepared an invoice reflecting the cost of the flowers. He also prepared several fictitious invoices as well as a note in the amount of $20,213.70 payable to L & L Designs from Lane's Flower Shop. He gave the phony invoices and the note to Sidney Heard who passed them on to Dennis Lane. After Dennis signed the note, Heard kept the original.

In July, 1980, J.C. and Dennis Lane signed a lease for the shop at 3602 A Avenue. Then, in November, J.C. obtained insurance on the shop from the American States Insurance Company. He insured the contents of the shop for $50,000.00. The shop never burned, however. On March 18, 1981, an Amarillo newspaper ran an article connecting Dennis Lane with a scheme to burn the Lubbock flower shop. On the same date, J.C. Lane cancelled the insurance policy.

D. Dennis Lane's Appearance Before the Grand Jury

On May 12, 1980 [*sic*], Dennis Lane appeared to testify before a Federal Grand Jury in Amarillo. At the time, the Grand Jury was investigating Sidney Heard. Lane testified that after talking to Lankford about the flower business, he decided to open a shop of his own. He chose Lubbock because Amarillo already had a flower shop (Lankford's business, L & L Designs). He said that he paid Lankford $5,000.00 cash to supply the original merchandise. He insured the contents of the store for $50,000.00 because that is the value of the goods he was supposed to receive ultimately from Lankford. He stated however that he never received the full amount and was not able to open the store as a result.

In the course of questioning, he responded as follows:

Q: Did Mr. Heard have anything to do with this flower shop?

A: No, sir.

Q: Did he have anything to do with your dealings with Lankford?

A: No, sir.

PROCEEDINGS BELOW

The Grand Jury indicted J.C. Lane for mail fraud in connection with the El Toro Restuarant fire (Count 1). It indicted both J.C. and Dennis Lane for mail fraud related to the duplex fire (Counts 2-4). They also were both indicted for conspiracy to commit mail fraud in the course of the Lubbock flower shop scheme (Count 5). Finally, Dennis Lane was indicted for perjury before the Grand Jury (Count 6). The indictment alleged that he committed perjury by denying that Sidney Heard was involved with the flower shop or with the transactions between Lane and George Lankford.

J.C. and Dennis Lane were tried jointly before a jury in the United States District Court for the Northern District of Texas, Amarillo Division. They filed pretrial Motions for Severance, contending that their offenses were misjoined in violation of Fed. Rule Crim.Proc. 8(b). They renewed the motions at the end of the Government's evidence, and again at the close of all evidence. The trial court denied the motions each time.

The jury convicted the defendants on each count against them. J.C. Lane was sentenced to a total of seven years' imprisonment and committed fines of $9,000.00.[5] Dennis Lane was found suitable for treatment under the Youth Corrections Act, 18 U.S.C.

[5] J.C. was sentenced to five years' imprisonment on Count 1 and a committed fine of $1,000.00. He was sentenced to two years' imprisonment on each of Counts 2 through 4, and committed fines of $1,000.00 on each count. Finally, he was sentenced to five years' imprisonment on Count 5 and a committed fine of $5,000.00. The terms of imprisonment in Counts 2-4 were to run concurrently; and the terms of Counts 1 and 5 were to run concurrently. However, the terms of Counts 2-4 were to run consecutively to the terms in Counts 1 and 5, for a total of seven years' imprisonment.

§ 4216. He was committed to the custody of the Attorney General for treatment and supervision under 18 U.S.C. § 5010(b) until discharged.

This appeal follows.

ISSUES

The appellants argue that the various counts were improperly joined. We agree that Count 1 should not have been joined with the others because it was not part of the same series of acts or transactions as Counts 2 through 6.

The appellants also argue that the evidence was insufficient to support the convictions for mail fraud, because the mailings did not further the fraudulent schemes. We reject this argument. The jury could find that the schemes were furthered by the mailings cited in the indictment, including those mailings which occurred after the defendants had received their insurance payments. Such subsequent mailings helped to lull the insurance companies into a sense of complacency.

Finally, Dennis Lane argues that the evidence of perjury before the Grand Jury was insufficient. He contends that the questions concerning Sidney Heard's involvement were too ambiguous and imprecise to form the basis for a conviction. Moreover, he argues that his answers were literally truthful or the result of an honest mistake. We reject all of those claims and hold that the evidence was sufficient to support a conviction.

DISCUSSION

I. Misjoinder

Federal Rule of Criminal Procedure 8 governs the initial joinder of counts in a criminal trial. Because this case involves multiple defendants as well as multiple counts, we look to Rule 8(b) for the relevant standards. *See United States* v. *Welch*, 656 F.2d 1039, 1049 (5th Cir. Unit A 1981); *United States* v. *Levine*, 546 F.2d 658, 661 (5th Cir. 1977). Rule 8(b) provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Improper joinder under Rule 8(b) is inherently prejudicial. *United States* v. *Dennis*, 645 F.2d 517, 521 (5th Cir. 1981); *United States* v. *Marionneaux*, 514 F.2d 1244, 1248 (5th Cir. 1975). The granting of a motion for severance, where there has been misjoinder, is mandatory and not discretionary with the district court. *Id.* Thus, misjoinder under Rule 8(b) is a matter of law and completely reviewable on appeal. *United States* v. *Welch*, *supra*, 656 F.2d at 1049; *United States* v. *Marionneaux*, *supra*, 514 F.2d at 1048.

The critical question in this case is whether all of the counts are part of the same series of acts or transactions. The answer to that depends

> "on the relatedness of the facts underlying each offense.... [W]hen the facts underlying each offense are so closely connected that proof of such facts is necessary to establish each offense, joinder of defendants and offenses is proper." *United States* v. *Gentile*, 495 F.2d 626, 630 (5th Cir. 1974). When there is no "substantial identity of facts or participants between the two offenses, thee is no 'series' of acts under Rule 8(b)." *Marionneaux*, 514 F.2d at 1249.

United States v. *Welch*, *supra*, 656 F.2d at 1049; *see United States* v. *Nettles*, 570 F.2d 547, 551 (5th Cir. 1978).

There is no substantial identity of facts between Count 1 and the other counts. The El Toro fire and the related fraud on the Transamerica Insurance Group involved events that were entirely separate from the

other crimes and that were completed before the other crimes began. There was no fact that could be proved to establish guilt under Count 1 which would also establish any of the other offenses. *See United States* v. *Welch*, *supra*, 656 F.2d at 1049; *United States* v. *Gentile*, *supra*, 495 F.2d at 630.

The government concedes this point, but argues that there is a substantial identity of participants between the El Toro fraud and the other crimes. Specifically, Sidney Heard and J.C. Lane participated in each of the three arson schemes. This does not, however, establish any identity of participants between Counts 1 and 6. Dennis Lane was the sole participant in Count 6, committing perjury before the Grand Jury. We have found no evidence in the record, and the government has not attempted to argue, that Dennis was a participant in Count 1, the El Toro fraud.

We also fail to find a sufficient identity of participants to justify the joinder of Count 1 with Counts 2 through 5. Heard and J.C. Lane were two out of the five participants in the duplex fraud[6] and two out of the four participants in the flower shop conspiracy.[7] This court has held that the mere identity of a small number of participants will not justify the joinder of multiple offenses involving several persons. The offenses must be shown to be part of a single plan or scheme. *See United States* v. *Welch*, *supra*, 656 F.2d at 1049; *United States* v. *Levine*, 546 F.2d 658, 662-63 (5th Cir. 1977); *United States* v. *Nettles*, *supra*, 570 F.2d at 551; *United States* v. *Marionneaux*, *supra*, 514 F.2d at 1248. Mere similarity of the offenses is not sufficient. *See United States* v. *Diaz-Munoz*, 632 F.2d 1330, 1336 (5th Cir. 1980);

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[6] The participants in that offense were J.C. Lane, Dennis Lane, Andrew Lawson, Sidney Heard, and Marvin McFarland (whom Heard instructed to burn the duplex).

[7] The participants in that conspiracy were J.C. Lane, Dennis Lane, Sidney Heard, and William Lankford.

United States v. *Marionneaux*, *supra*, 514 F.2d at 1248; *see also United States* v. *Welch*, *supra*; *United States* v. *Nettles*, *supra*. Otherwise the government could take any two counts, however disconnected, and join them in one trial so long as they involved the same type of crime and some of the same defendants. The requirement of a common scheme ensures that the offenses are actually part of a *series* of transactions.

Proof of a common scheme is typically supplied by an overarching conspiracy from which stems each of the substantive counts. *See, e.g. United States* v. *Nickerson*, 669 F.2d 1016, 1022 (5th Cir. Unit B 1982); *United States* v. *Phillips*, 664 F.2d 971, 1016 (5th Cir. Unit B 1981); *United States* v. *Leach*, 613 F.2d 1295, 1303 (5th Cir. 1980). The indictment in this case charges no such conspiracy, however. Count 5 alleges a conspiracy to commit mail fraud in the Lubbock flower shop scheme, but that conspiracy did not encompass the prior El Toro fraud. *See United States* v. *Gentile*, *supra*, 495 F.2d at 632.

Nor does the indictment allege, or the evidence show, a single scheme involving all three fires. The El Toro fraud was conceived more than a year before the other offenses. It involved a different victim than the other crimes. *Compare United States* v. *Dennis*, *supra*, 645 F.2d at 520-21. The government points us to no evidence at trial showing that there was a greater plan to commit a series of arsons for profit when the El Toro fire was planned and carried out. On the contrary, when J.C. Lane first approached Sidney Heard and proposed the El Toro fire, Lane stated that he was in a losing restaurant business and wanted to get out of his lease and his partnership with Jack Stotts. The other two fires, by contrast, did not involve legitimate ongoing businesses with innocent partners;[8] both the duplex

[8] The other partners in the El Toro restaurant (Jimmy Lane, Bill Dale, and Jack Stotts) have not been implicated in the arson plan.

and the flower shop were set up purely for an insurance scam.

There is other evidence of a single scheme involving Counts 2 through 6. J.C. Lane, Dennis Lane, and Sidney Heard discussed both the duplex fire and the flower shop plan at a meeting in J.C. Lane's office several weeks after the duplex burned. In addition, the Lanes invested insurance proceeds from the duplex fire into the Lubbock venture. Thus, Counts 2 through 5 may be joined together. Moreover, since Count 6 involves perjury about Heard's participation in part of the scheme, that count may also be joined.

There are no such links, however, to Count 1. We hold that it was improperly joined with Counts 2 through 6. Rule 8(b) misjoinder is prejudicial *per se* in this circuit. *See United States* v. *Levine*, *supra*, 546 F.2d at 661; *see also United States* v. *Dennis*, *supra*, 656 F.2d at 521. Therefore, we reverse and remand. If the government still wishes to try J.C. Lane and Dennis Lane together, Count 1 must be severed from the others.

II. Sufficiency of Evidence

A. Mail Fraud

The appellants also argue that the evidence was insufficient to support the convictions for mail fraud in Counts 1 through 4. The mail fraud statute, 18 U.S.C. § 1341, only reaches those instances in which the use of the mails is part of the execution of a fraud. *See Kann* v. *United States*, 323 U.S. 88, 93-95, 65 S.Ct. 148, 150-151, 89 L.Ed. 88 (1944). The appellants make two separate arguments that the mailings alleged in the indictment did not further the El Toro fraud or the duplex fraud.

First, with respect to the El Toro Restaurant fire, the indictment alleges that on June 1, 1979, J.C. Lane caused to be mailed an envelope containing two items. They were: (1) a memorandum by David Lard (Trans-

america's adjustor) requesting his company's advice on settling the "business earnings/loss of profits" portion of Lane's policy; and (2) a list of monthly income and expenses for the El Toro Restaurant submitted by J.C. Lane. The indictment alleges that the mailing was for the purpose of executing a scheme to defraud Transamerica.

Lane contends, however, that the mailing did not have a sufficiently close relationship to the alleged scheme. *See United States* v. *Maze*, 414 U.S. 395, 399, 94 S.Ct. 645, 647, 38 L.Ed.2d 603 (1974). He argues that the information mailed on that occasion concerned only his own business expenses and that the mailing could not have furthered the execution of the fraud because he did not receive payment until five months later.

We disagree and hold that a jury could find that the mailing was for the purpose of executing the fraud. The memorandum by Lard was an early step in processing the claim under the business earnings portion of Lane's policy. It requested the company to consider the claim and render advice on a proper settlement. A reasonable jury could find that the memo helped get the wheels rolling and ultimately led to a payment under the claims.[9]

Moreover, the list submitted by J.C. Lane contributed to the process. Contrary to appellant's assertion,

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[9] J.C. could have reasonably forseen [*sic*] that Lard would send such a memo to the company headquarters after a claim was made for business expenses; therefore, J.C. can be said to have "caused" the mailing of the memo. *See United States* v. *Shaid*, 730 F.2d 225, 229 (5th Cir.1984).

> We have held that when an individual does an act with the knowledge that the use of the mails will follow in the ordinary course of business, or when such use can reasonably be forseen, even though not actually intended, then he/she "causes" the mails to be used.

Id.

the list never purports to register only J.C.'s business expenses. Rather, it is styled "a breakdown of income and expenses for *El Toro Restaurant* taken from averaging September, October, November and December records." Government's Exhibit 13 (emphasis added). Lard's memo refers to the list in the context of the business expense claim and describes it simply as a "list of profits[,] expenses[,] etc." *Id.* Reasonable jurors could conclude that J.C. submitted the list in support of the claim. They could also conclude that the list purported to provide Transamerica with an estimate of the average net profits the restaurant would have earned had it not been damaged.

Thus, the list was closely related to the fraudulent scheme. Moreover, its mailing furthered the execution of the fraud even though the ultimate settlement of the claim was for a different amount and was paid five months later. By submitting the estimate of lost earnings, Lane implicitly reemphasized his belief that the restaurant had a legitimate claim under the policy. Furthermore, his submission was a first step in the negotiations leading up to a final settlement. In sum, there was sufficient evidence to support the verdict on Count 1.

The appellants' argument with respect to Counts 2 through 5 is a bit more subtle but equally unavailing. The mailing alleged in Count 2 included a report by William Liles (the adjustor for Trinity Universal) and a Proof of Loss submitted by Dennis Lane and Andrew Lawson. The mailing in Count 3 included a separate memo by Liles and two Proofs of Loss submitted by Lane. In each case, the Proof of Loss corresponded to a payment that the insured had already received from Trinity Universal.[10] Likewise, the final mailing (con-

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[10] The first Proof of Loss was dated May 9, 1980; it substantiated a loss of $7,000.00. L & L Properties (the company of Lane and Lawson) received a draft for $7,000.00 on that same date.

taining fraudulent invoices prepared by Heard and J.C.) came on September 18, 1980, *two days after* the final payment under the policy.

The Lanes argue that none of these mailings was "for the purpose of executing the fraudulent scheme" because each mailing came after payment had been received—i.e. after the scheme had reached its fruition. *See United States* v. *Ledesma*, 632 F.2d 670, 677-78 (7th Cir. 1980). In *Ledesmaa*, a defendant was charged with mail fraud in connection with a scheme to defraud an insurance company. He reported the theft of his mobile home, although it had not actually been stolen. Upon receiving a check from the insurance adjustor, he submited a false Proof of Loss. The Seventh Circuit held that the scheme had reached fruition with the delivery of the check. Therefore, the subsequent mailing of the Proof of Loss did not come within the Mail Fraud statute. *Id.*

The Seventh Circuit relied upon the Supreme Court's reasoning in *United States* v. *Maze*, *supra*. We hold, however, that *Maze* is distinguishable from the present case. In *Maze*, the respondent Thomas Maze had stolen Charles Meredith's Bank Americard in Louisville, Kentucky, and then travelled to Southern California.

The Proof of Loss and Liles' report were mailed on May 15.

The Proofs of Loss alleged in Count 3 were not dated, but they were mailed along with Liles' memo on August 6, 1980. One of them claimed a loss of $3,000.00 Both sides agree that this document corresponded to a payment made on May 30, 1980. The other Proof of Loss claimed $2,000.00. The appellants argue that it corresponded to a payment made on May 21. The Government replies that the May 21 payment was represented by an entirely separate $2,000.00 Proof of Loss mailed on May 25. The government, however, never explicitly denies that either of the Proofs of Loss mailed on August 6 reflected a prior payment. Therefore, we will assume *arguendo* that each of the Proofs of Loss corresponded to money already received from Trinity Universal.

Along the way, he had obtained food and lodging by presenting the card and fraudulently signing Meredith's name. Maze was indicted for mail fraud because the sales slips were returned by mail to the Louisville bank that had issued the card, and ultimately the bank mailed the slips to Meredith. The Supreme Court held that the scheme reached its fruition when Maze received his goods and services. *Id.* 414 U.S. at 400-402, 94 S.Ct. at 648-649.

Moreover, the Court held that the subsequent mailings were not in execution of the fraud because there was no evidence that they could enhance the success of Maze's scheme:

> [T]here is no indication that the success of his scheme depended in any way on which of his victims [the motels or the bank] ultimately bore the loss. Indeed, from his point of view, he probably would have preferred to have the invoices misplaced by the various motel personnel and never mailed at all.

Id. at 402, 94 S.Ct. at 649. The Court distinguished *United States* v. *Sampson*, 371 U.S. 75, 83 S.Ct. 173, 9 L.Ed.2d 136 (1962), in which subsequent mailings were held to be in execution of fraud because they were designed to lull the victims into a false sense of security and postpone investigation. Maze could not have intended the mailing of his sales slip to have such a lulling effect. "[T]he successful completion of the mailings from the motel owners . . . to the Louisville bank [and ultimately to Meredith] increased the probability that respondent would be detected and apprehended." 414 U.S. at 403.

In the present case, however, the jury could infer that the mailings were intended to and did have a lulling effect.[11] The Proofs of Loss and the false in-

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[11] The trial judge had instructed the jury that mailings "which facilitate concealment of the scheme are mailings in furtherance of the scheme." Record at 292.

voices submitted by Dennis Lane were "designed to . . . make the transaction less suspect," convincing Trinity Universal that the claims were legitimate. *United States* v. *Schaid*, *supra* note 9 at 230; *United States* v. *Toney*, 598 F.2d 1349, 1353 (5th Cir. 1979), *citing United States* v. *Sampson*, *supra*.

The Proofs of Loss declared that the "loss did not originate by any act, design or procurement on the part of [the] insured" and that no attempt had been made to decieve the insurance company. Trinity required the insured to submit the forms; any failure to comply might have alerted Trinity to the possibility of a fraud.

Similarly, the invoices gave the impression of a perfectly innocent claim. The building supplies and furniture that Lane claimed to have purchased for the duplex were set out in minute detail. The invoices were dated randomly and torn out of the invoice book at random points to indicate that L & L Properties was not the sole customer of the "supplier" Trim-Tex. A reasonable jury could find that all of these details were intended to lull Trinity into a false sense of security.

The three mailings were for the purpose of executing the fraudulent scheme. The evidence was sufficient to support the mail fraud convictions.

B. Perjury Before the Grand Jury

Dennis Lane also contests the sufficiency of evidence on the perjury count. The indictment alleges that he committed perjury by denying that Sidney Heard had anything to do with the flower shop or with Dennis's dealings with Lankford. Dennis argues that the evidence was insufficient for three interrelated reasons:

1. The questions propounded to Appellant before the Grand Jury were so ambiguous and imprecise that such questions cannot serve as a predicate for prosecution and conviction for making a false statement in response to such questions;

2. Appellant gave literally truthful answers to the ambiguous and imprecise questions propounded to him before the Grand Jury; and
3. Appellant's answers were the result of honest mistake and misunderstanding of ambiguous and imprecise questions.

Appellant's Brief at 24-25.

Dennis Lane claims that the questions were ambiguous, because they could be interpreted to ask whether Heard owned the flower shop. It is true that the

> essence of the crime of false swearing is the defendant's knowledge at the time of his testimony that it is untrue. . . . The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry.

United States v. *Crippen*, 570 F.2d 535, 537 (5th Cir. 1978); *see also Bronston* v. *United States*, 409 U.S. 352, 93 S.Ct. 595, 34 L.Ed.2d 568 (1973). The questions put to Dennis Lane, however, were not ambiguous in the context of the case. *See United States* v. *Makris*, 483 F.2d 1082, 1087-88 (5th Cir. 1973). Sidney Heard had been intimaely involved with the flower shop and with the transactions between Dennis Lane and William Lankford. Heard proposed the flower shop scheme at the original meeting in J.C. Lane's office. Heard said that he knew a man who could supply the flowers; and after the meeting, he visited Lankford to solicit his participation in the fraud. Heard introduced Lankford to Dennis Lane in June, 1980, when Heard and Dennis came out to inspect Lankford's existing flower shop. Then, in July, Heard helped Dennis pick out the property in Lubbock for the new shop that was to be burned. Before parting that day, Dennis gave Heard a check made out to L & L Designs (Lankford's company) for the first shipment of flowers.[12]

---

[12] During his testimony before the Grand Jury, Dennis stated that he had given Lankford $5,000.00 cash for the flowers. Later, on June 26, 1981, Dennis's attorney wrote a letter to

Heard and Lankford planned to split $20,000.00 of the insurance proceeds, as reflected by a $20,000.00 note payable to L & L Designs from Lane's Flower Deisngs. Lankford drew up the note, and Heard hand-delivered it to Dennis Lane to be signed. After it was signed, Heard kept the original. Heard also delivered fictitious invoices from Lankford to Lane.

Clearly, the question whether Heard had "*anything to do with* the flower shop" would cover his involvement in the scheme. The question does not mention ownership of the shop, but asks whether Heard had *any* involvement. The jury could properly find the question unambiguously covered his conduct. In the same way, the question whether Heard had "*anything to do with* [Dennis's] dealings with Mr. Lankford" clearly covered Heard's close involvement in recuriting Lankford, introducing him to Dennis, and delivering documents from one to the other. We cannot agree that the questions were so ambiguous and imprecise as to preclude a guilty verdict. A reasonable jury could find that Dennis understood the questions and knew that his answers were false.

CONCLUSION

In sum, we find that Count 1 was improperly joined with Count 2 through 6. We must reverse and remand. None of the counts is dismissed outright, however, because the evidence was sufficient to support the convictions for mail fraud and perjury.[13]

REVERSED and REMANDED.

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government counsel stating tht Dennis had found the check to L & L Designs. The check refreshed his memory, and he now recalled that he had delivered the check rather than cash to Lankford. At trial, however, Dennis conceded that he had given the check to Sidney Heard.

[13] The appellants have not challenged the sufficiency of evidence on the conspiracy count.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1742

D.C. Docket No. CR-2-83-012

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

JAMES C. LANE AND DENNIS R. LANE,
DEFENDANTS-APPELLANTS.

[Filed June 18, 1984]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

Before GOLDBERG, RUBIN and REAVLEY, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said District Court in accordance with the opinion of this Court.

ISSUED AS MANDATE:

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1742

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

JAMES C. LANE AND DENNIS R. LANE,
DEFENDANTS-APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING AND SUGGESTION FOR FOR REHEARING EN BANC
(Opinion June 18, 5 Cir., 1984, ___ F.2d ___)
(August 22, 1984)

Before GOLDBERG, RUBIN and REAVLEY, *Circuit Judges.*

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Proce-

dure and Local Rule 35) the Suggestion for Rehearing En Banc in also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideraton of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc in DENIED.

ENTERED BY THE COURT:

/S/ _____
United States Circuit Judge

Office - Supreme Court, U.S.
FILED
DEC 7 1984
ALEXANDER L. STEVAS,
CLERK

NO. 84-744

In The Supreme Court of the United States
October Term, 1984

UNITED STATES OF AMERICA,
PETITIONER

vs.

JAMES C. LANE AND DENNIS R. LANE,
RESPONDENTS

BRIEF OF REPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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13pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NO. 84-744

In The Supreme Court of the United States
October Term, 1984

UNITED STATES OF AMERICA, Petitioner
vs.
JAMES C. LANE AND DENNIS R. LANE,
Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents, James C. Lane and Dennis R. Lane, respond to the Petition of the United States for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit, as follows:

STATEMENT

Respondents adopt, for the purpose of this response, the contents of the Government's Petition under the headings, "Question Presented," "Opinion Below," "Jurisdiction," "Rules Involved," and "Statement."

RESPONSE TO REASONS FOR GRANTING THE PETITION

Petitioner seeks a writ of certiorari to resolve an apparent conflict among the circuits concerning the question presented, *i.e.,* whether misjoinder in violation of Rule 8(b), Federal Rules of Criminal Procedure, is *per se* prejudicial, or is subject to the harmless error evaluation of Rule 52(a). Candor requires that Respondents acknowledge that there is an apparent conflict among the Circuit Courts of Appeal on the question presented. Such a conflict is among the reasons generally considered as worthy of review by certiorari. Sup. Ct. R. 17.1(a). Upon the question presented, Respondents assert that the proper course is for this Court to deny certiorari, or, in the alternative, grant certiorari and affirm the Judgment of the Court of Appeals, for the reasons discussed *infra.*

Although there is an apparent conflict among the Circuits on the question presented, the position of the Fifth Circuit is correct and in accord with the decision of this Court in *McElroy v. United States,* 164 U.S. 76 (1896). In the *McElroy* case this Court established a *per se* rule of prejudice arising from misjoinder. Rule 8 embodies a "statutory right expressly conferred," a "specific command of Congress," determining the proper limits of joinder and its inherent prejudice. Application of the harmless error rule to misjoinder would be inconsistent with legislative history and the intent of the rule-making authority, and an unreasonable construction of Rule 8 and Rule 52. Further, reasons of judicial economy justify a rule of *per se* prejudice for misjoinder in violation of Rule 8.

The Government argues that Rule 52(a) should be applied to misjoinder. The difficulty with this argument is that this Court has ruled otherwise. In *McElroy v. United*

States, 164 U.S. 76 (1896), in interpreting the statutory forerunner to Rule 8, and ruling upon an assertion of harmless error from misjoinder, this Court observed that

> [i]t cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions. The order of consolidation was not authorized by statute and did not rest in mere discretion.

id. at 81. The Government takes the position that *McElroy,* "while often cited for the proposition that misjoinder is prejudicial per se, in fact does not establish such a rule." Petition at 10, n. 10. Relying upon *United States v. Granello,* 365 F.2d 990 at 995 (2nd Cir. 1966), and substituting elipses for significant language, the Government takes the position that *McElroy* is limited to its facts. Petition at 10, n. 10. To the contrary, the decision in *McElroy,* in a general statement of the logical underpinnings of Rule 8, stated that "it cannot be said *in such case* that all the defendants may not have been embarrassed and prejudiced in their defense . . . ." *McElroy v. U.S., supra* at 81. (emphasis added). The language in *McElroy* indicates a *per se* rule of prejudice from misjoinder, and there is no indication that the rule was limited to the facts of that case.

This rule of *per se* prejudice has a sound basis in reason, as it is factually and logically impossible to disprove prejudice in cases of misjoinder in violation of Rule 8(b).

> In cases of felony the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury or otherwise,

> that it is the settled rule in England and in many of our states to confine the indictment to one distinct offense, or restrict the evidence to one transaction.

McElroy v. United States, supra at 80. "A risk of prejudice, either from evidentiary spillover or transference of guilt, inheres in any joinder of offenses or defendants." *King v. United States,* 355 F.2d 700, 703 (1st Cir. 1966). "The dangers of transference of guilt . . . are so great that no one really can say prejudice to substantial rights" does not occur with misjoinder. *Kotteakos v. United States,* 328 U.S. 750 at 774 (1946).

Examination of Rules 8(b) and 52(a), and their legislative history, and reasonable construction of these rules, support a determination that misjoinder is *per se* prejudicial. Rule 8 and Rule 13 are, in substantial part, recodifications of a statute which formerly appeared as Revised Statutes § 1024. The notes of the Advisory Committee on Rules with respect to Rules 8 and 13 indicate that they are substantially restatements of existing law. Thus the construction of §1024 of the Revised Statutes [now Rule 8] announced in *McElroy v. United States, supra,* still applies. *See Schaffer v. United States,* 362 U.S. 511, 521 (1959) (Douglas, J., dissenting); *U.S. v. Graci,* 504 F.2d 411 at 413 (Cir. 1974).

The earliest explicit statutory predecessor of the Rule 52(a) appears to have been §269 of the Judicial Code, Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181. It might be argued that this 1919 Amendment to the Judicial Code was intended to limit the joinder rule and thereby to limit the effect of the court's opinion in *McElroy.* But we are dealing with statutory rights expressly conferred. *U. S. v. Graci, 504 F.2d 411 at 414 (3rd Cir. 1974); see Kotteakos v. U.S.,* 328 U.S. 750 (1946). Congress has in Rule 8 and Rule 13 defined the permissable scope of joint trials of offenses and offenders. It has in Rule 14 provided a mechanism for protecting against prejudice even within the permissable

scope. It seems a strained interpretation of the harmless error statute that it was intended to dilute statutory protections expressly granted. *U.S. v. Graci, supra* at 414. The view that violations of Rule 8 and Rule 13 cannot be treated as harmless is expressed by Cipes in 8 Moore's Federal Practice, ¶8.04[2] (1965) and by Professor Wright in Wright, Federal Practice and Procedure, Criminal § 144, at 328-29 (1969). *See also United States v. Graci,* 504 F.2d 411, at 414 (3rd Cir. 1974).

This Court has recognized in *Kotteakos v. United States,* 328 U.S. 750 (1946), that errors which represent departure from a "specific command of Congress" are possible exceptions to the harmless error rule. Rule 8 constitutes a "statutory right expressly conferred," which carries the force of a "specific command of Congress." Rule 8 is an enactment of this Court under the rule-making authority delegated by Congress under Title 18. U.S.C. § 3771. As such, it constitutes "a specific command," with the authority of Congress under the Necessary and Proper Clause, in furtherance of Article III of the Constitution. *Hanna v. Plumer,* 360 U.S. 460 at 472 (1965). Accordingly, the harmless error rule should be construed as inapplicable to Rule 8.

Guilt is both individual and personal. *Kotteakos v. United States,* 328 U.S. 750, 773; *United States v. Turkett,* 632 F.2d 896 (1st Cir. 1980). Thus, a defendant charged with committing multiple crimes is entitled to a separate trial for each crime that is not "substantially part of the same transaction," *McElroy v. United States, supra; United States v. Turkett, supra;* one accused with others, has "the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others[.]" *Kotteakos, supra,* at 775. Nevertheless, joinder of offenses or parties has the salutory effect of promoting judicial economy. Fed. R. Crim. P. 8

balances the competing considerations of the benefit to the court, prosecution, and the public with the presumptive prejudice inherent in the consolidation of parties or offenses by permitting joinder if certain requirements are met. Rule 8 "set the limits of tolerance" beyond which the danger of prejudice outweighs the benefit, and any joinder which does not fall within Rule 8 "is *per se* impermissible." *King v. United States,* 355 F.2d 700, 703 (1st Cir. 1966); *United States v. Turkett, supra* at 906. Rule 8 is a final determination, by the rule-making authority, of the permissable limits of joinder and the prejudice inherent in such joinder, *King v. United States, supra,* and these competing interests should not be continually re-evaluated under the Harmless Error Rule. *See Kotteakos v. United States, supra* at 773. For the Federal courts to engage in the same weighing and comparison of the competing interests of prejudice and judicial economy in each case of misjoinder, as requested by the Government, would be inconsistent with Rule 8, and its history.

The construction which the Government advocates would bring Rule 8 and Rule 52 into square conflict, eviscerating Rule 8 and rendering it redundant of Rule 14. Certainly the rule-making authority intended no such construction and "[t]he two sections must be construed and applied so as to bring them into substantial harmony, not into square conflict." *Kotteakos v. United States, supra* at 775. Such an internal inconsistency in the Rules of Criminal Procedure is not a reasonable construction of the intent of the rule-making authority. As Professor Charles Wright has observed:

> Indeed there would be no point in having Rule 8 if the harmless error concept were held applicable to it. If that concept could be applied, then defendant could obtain reversal only if the joinder were prejudicial to

him. But Rule 14 provides for relief from prejudicial joinder, and a defendant can obtain reversal, in theory at least, if he has been prejudiced even though the joinder was proper. If misjoinder can be regarded as harmless error, then reversal could be had only for prejudice whether the initial joinder was proper or improper. If that were true, it would be pointless to define in Rule 8 the limits on joinder, since it would no longer be of significance whether those limits were complied with, and the draftsman would have been better advised to allow unlimited joinder of offenses and defendants, subject to the power of the court to give relief if the joinder were prejudicial.

1 C. Wright, Federal Practice and Procedure, 329 (1969).

The history of Rule 52(a) shows that its general object was to preserve appellate review while eliminating a "multiplicity of loopholes." *Kotteakos v. United States, supra,* at 760. The purpose of the rule in its final statutory form was stated authoritatively to be

> [t]o cast upon the party seeking a new trial the burden of showing that any technical errors that he may complain of have affected his substantial rights, otherwise they are to be disregarded. [But,] [t]he . . . legislation affects only technical errors. If the error is of such a character that the natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will, notwithstanding this legislation, rest upon the one who claims under it.

H. R. Rep. No. 913, 65th Cong. 3d Sess., 1; *Kotteakos v. United States, supra* at 760.

It is clear from the history of the Harmless Error Rule that it was concerned with "technical errors, defects, or exceptions which do not affect the substantial rights of the parties." Rule 52(a), however, omits the words "technical errors" and substitutes the general term "any error",

while still exempting "substantial rights." Because Rule 52(a) omits the words "technical errors" which was previously included in the Statute, some have construed this as an enlargement of the scope of the Harmless Error Rule, and that "these changes [i.e., from "technical errors" to "any error"] indicate a Congressional intent to emphasize the concept that any error not causing detriment should be disregarded . . ." *U. S. v. Seidel,* 620 F.2d 1006 at 1013 (4th Cir. 1980). But Rule 52(a) by its own terms does not apply to errors affecting "substantial rights." Therefore, in addressing the question presented, this Court must determine whether misjoinder in violation of Rule 8(b) is a mere "technical error," or affects "substantial rights." "If the error is of such a character that its natural effect is to prejudice a litigant's substantial rights," the Harmless Error Rule should not apply to misjoinder. *See Kotteakos v. U.S., supra* at 760.

Respondents contend that misjoinder is inherently prejudicial and is of such a character that its natural effect is to prejudice a litigant's substantial rights. "A risk of prejudice, either from evidentiary spillover or transference of guilt, inheres in any joinder of offenses or defendants," and "[T]he dangers of transference of guilt . . . are so great that no one can really say prejudice to substantial rights" does not occur with misjoinder. *Kotteakos v. United States, supra* at 774. Misjoinder historically has been considered objectionable and prejudicial, for the reasons expressed in *McElroy v. U.S., supra* at 80. Accordingly, it is the settled rule to confine an indictment to one distinct offense, or restrict the evidence to one transaction. *McElroy v. U.S., supra* at 80. Rule 8 embodies this principal, and constitutes an express grant of a "substantial right." This Court has expressly ruled, in *Kotteakos v.*

United States, supra, that the rule against misjoinder embodies a substantial right. That right is the right not to be tried *en masse* for a conglomeration of distinct and separate offenses committed by others. *Kotteakos v. U.S., supra* at 775. It is not "harmless error" to violate a fundamental procedural rule designed to prevent "mass trials." *Ingram v. United States,* 272 F.2d 567 (4th Cir. 1959).

Considerations of judicial economy support a rule of *per se* prejudice from misjoinder. The Government proposes the application of Rule 52(a) to misjoinder, so that appellate courts will be required to engage "in the same sort of carefully inquiry into the possibility of prejudice that has characterized the proper application of the harmless-error rule in other contexts", a rule that would require appellate courts to "undertake the same examination with respect to Rule 8" as applied in reviewing complaints of prejudicial joinder and abuse of discretion under Rule 14. Petition at 11. This would necessitate case-by-case, laborious, tedious, time-consuming study of trial evidence by the reviewing court. But the Federal Courts are "far too busy to be spending countless hours reviewing trial transcripts in an effort to determing the likelihood that error may have affected a jury's deliberations." *United States v. Hasting,* _____U.S._____. 103 S.Ct. 1874 at 1984 (1983) (STEVENS, J., concurring). "A defendant's liberty should not so often depend upon our struggle with the particular circumstances of a case to determine from a cold record whether or not the . . . [error was] . . . harmless." *United States v. Hasting, supra,* at 1990 n. 6 (BRENNAN, J., concurring in part and dissenting in part), quoting *United States v. Rodriguez,* 627 F.2d 110 (7th Cir. 1980). Harmless error review consumes

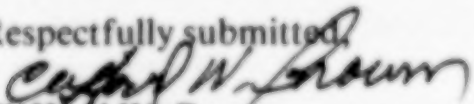
valuable and scarce judicial time and resources. A rule of *per se* prejudice from misjoinder has the beneficial effect of precluding review of trial evidence by an over-burdened appellate court, thus conserving judicial resources and promoting judicial economy. A rule of *per se* prejudice from misjoinder has the beneficial effect of deterring misjoinder, thereby reducing the risk of reversal, and the attendant burden of subsequent retrials on remand. Accordingly, this Court should continue to adhere to the rule of *per se* prejudice from misjoinder first announced in *McElroy v. United States, supra.*

The rule against jointly indicting and trying different defendants for unconnected offenses is a long-established procedural safeguard. Its purpose is to prohibit exactly what was done here, namely, allowing evidence in a case against one Defendant to be presented in the case against another charged with a completely disassociated offense, with the danger that the jury might feel that the evidence against the one supported the charge against the other. The error in this case was not harmless; Respondents were prejudiced by misjoinder. The error requires reversal of Respondents' convictions.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondents, James C. Lane and Dennis R. Lane, pray that the Petition for writ of certiorari be denied, or, in the alternative, if the Petition is granted, that this Court enter its judgment affirming the Judgment of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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Attorneys for Respondents

Office - Supreme Court, U.S
FILED
APR 1 1984
ALEXANDER L. STEVAS
CLERK

Nos. 84-744 and 84-963

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES C. LANE AND DENNIS R. LANE

JAMES C. LANE AND DENNIS R. LANE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITIONS FOR A WRIT OF CERTIORARI FILED NOVEMBER 6, 1984, AND DECEMBER 7, 1984
CERTIORARI GRANTED FEBRUARY 19, 1985

TABLE OF CONTENTS*

* The opinion of the court of appeals is printed in the appendix of each petition for a writ of certiorari and has not been reproduced.

535 06/08/83 AP-179

SUBJECT																		CROSS APPEAL NO.	CASE NUMBER
CRIM	PRIS w/	PRIS w/out	2255 w/	2255 w/out	SOC SEC	NLRB	P.C DIV	P.C FED	U.S. CIV	TAX COURT	BKCY	Oth Agcy Review	CIVIL RIGHTS	TAX D.C.	SCHOOL	CROSS APPEAL			83-1742
XX																			

CIRCUIT 5 APPEAL FROM Northern DISTRICT OF Texas AT Amarillo

DATE DOCKETED 10/19/83 $65 FEE PAID in D.C. JUDGE Mary Lou Robinson -

DATE NOTICE OF APPEAL FILED 10/17/83

D.C. DOCKET NUMBER CR-2-83-012 REPORTER R. T. Capwell

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES C. LANE and
DENNIS R. LANE,

Defendants-Appellants.

RELEVANT DOCKET ENTRIES

APPEARANCE FILED—DATE	CODE	ATTORNEYS FOR APPELLANT	ARG
11/8/83	✓	Clifford W. Brown, 1601 Broadway St., Lubbock, TX 79401 (806) 763-9493	✓
11/8/83	✓	Robert Michael Brown -do-	

APPEARANCE FILED—DATE	CODE	ATTORNEYS FOR APPELLEE	ARG
		James A. Rolfe, U.S. Atty., 310 U.S. Courthouse, Fort Worth, TX 76102 (FTS: 334-3291)	
10/31/83	✓	Shirley Baccus-Lobel, AUSA, 1100 Commerce, Room 16G28, Dallas, TX 75242 (FTS 729-0951)	✓

TITLE: U.S.A. -vs- LANE, ET AL.

83-1742

1. RECORD, EXHIBITS AND BRIEF INFORMATION | Filing:

DEC 14 1983 — Partial Record or Cert. List
DEC 14 1983 — Record on Appeal — No. of Vols. 9
_____ — Supp. Record — No. of Vols. _____
_____ — Second Supp. Record — No. of Vols. _____
DEC 14 1983 — Third Supp. Record — No. of Vols. _____
DEC 14 1983 — Exhibits ☐ Env. ☑ Box ☐ Pkg. ☐ Roll
_____ — Exhibits ☐ Env. ☐ Box ☐ Pkg. ☐ Roll
FEB 2 1984 — Appendix ☐ (P) ☐ (M)
_____ — Record Excerpts
12-14-83 — Supp. Certified List
12-14-83 — Briefing Notice Issd. 1-23-84
JAN 23 1984 — Brief for Appellant (BH)
_____ — Brief for Appellant
_____ — Brief for Appellant
_____ — Brief for Cr. Appellant
MAR 16 1984 — Brief for Appellee (I)
_____ — Brief for Appellee
_____ — Brief for Appellee
_____ — Brief for Cr. Appellee
_____ — Reply Brief for Appellant
_____ — Reply Brief for Cr. Appellant
_____ — Supp. Brief for Appellant
_____ — Supp. Brief for Appellee
_____ — Brief for Amicus
_____ — Intervenor
_____ — Rule 28(j) letter—Appellant
_____ — Rule 28(j) letter—Appellee

MISCELLANEOUS FILINGS | Filing:

10/19/83 — Dup. Notice of Appeal and Clerk's Statement of Docket Entries
_____ — Papers Trans. from Misc. No. _____
_____ — Order of DC Granting Appeal IFP
_____ — Order of DC Appointing Counsel
_____ — Affidavit of Financial Status
_____ — CJA 20 Issd./Voucher Recd. _____

AGENCY REVIEW CASES | Filing:

_____ — Petition for Review of Order ( ) of ☐ NLRB ☐ FERC ☐ ICC ☐
_____ — Application for Enforcement—NLRB
_____ — Answer to Application for Enforcement
_____ — Cross Application for Enforcement

4. EXTENSION Flg. Motion for:	Order Fld.	Ext. to:
_____ Transcript		
_____ Transcript		
_____ Transcript		-
_____ Appellant's Brief		
_____ Appellant's Brief		
_____ Appellant's Brief		
2-23-84 Appellee's Brief		3-14-84
_____ Appellee's Brief		
_____ Appellee's Brief		
_____ Reply Brief		

5. CALENDAR INFORMATION

Special Panel _____
Summary Panel: _____
3-9-84 — Case Assigned for 4-16-84 in ☑ EB ☐ W ☐ E ☐ _____
_____ — Case Cont'd for Reassignment _____
_____ — Case Reassigned for _____ in ☐ EB ☐ W ☐ E ☐
Hearing Panel: ILG-ABR-TMR
4-16-84 — Case Argued ☑ by Appellant ☑ by Appellee
_____ — Case Sub. w/o Arg. ☐ by Appellant ☐ by Appellee

6. OPINION INFORMATION ✓

6/18/84 Opinion Rendered

	Affirmed				
ILG	Reversed				
	Affd. in Pt.		P.C.		Conc. Spec.
	Vacated	XX	Signed		Dis.
	Dismissed		Rule 21		Dis. in Pt.

_____ — Opinion Withdrawn _____
4400

7. REHEARING INFORMATION

6-29-84 — Mot. for Ext.—Ext. to: 8-1-84 (USA)
_____ — Mot. for Ext.—Ext. to: _____
JUL 31 1984 — Petition for Rehearing (I)
☐ Appellant ☑ Appellee ☐ Reg. ☑ En Banc
_____ — Petition for Rehearing _____
☐ Appellant ☐ Appellee ☐ Reg. ☐ En Banc
_____ — Response of _____
08-22-84 — Order Denying Rehearing
☐ Dissenting
_____ — ☐ Opinion S9
_____ — ☐ Order on Petition for Rehearing S9

NO.

8. MOTIONS

Filing Motion to or for:	Response Filed By	Date	Granted	Denied	By Court	By Clerk	Date
Mandamus							
Reinstate Appeal							
Stay Further Proceedings in CA							
Stay Pending Appeal							
Injunction Pending Appeal							
Consolidate Appeals W/							
Leave to Appeal IFP							
Bail Pending Appeal							
Withdraw as Counsel							
Appointment of Counsel							
Supplement Record							
Expedite							
File Brief in Excess Pgs.							
File Brief in Excess Pgs.							
Dismiss by Appellant							
Dismiss by Appellee							
Amicus Curiae							
File Supp. Brief							
8-28-84 Stay of Mandate (USA)			✓		ABR		8-31-84 (to 9-28-84)
Recall of Mandate							
Intervene							
Intervene							
File Reply Br. out of time							
9-27-84 Further Stay of Mandate	Pet.	9/25/84 (ABR)	✓		ABR		10-3-84
10/22/84 Further Stay of Mandate	Ltr.	10/24/84 (ABR)	✓		ABR		(to 10-21-84 / to 11-20-84)

9. OTHER DOCKET ENTRIES

84-963 (Lane, et al)
84-744 (USA)

10. JUDGMENT OR MANDATE INFORMATION

	Bill of Costs
	Flg. & Entg. Judgment
	Issg. Copy of Jdgt. to Bd & Cnsl.
	Mandate Stayed to
07/11/84	Jdgt. as Mdt. Issd. to Clerk
	Jdgt. as Mdt. Reissd. to Clerk
	Dismissal Issd. to Clerk
	Record on Appeal Retd. to Clerk
	Exhibits Retd. to Clerk

11. SUPREME COURT INFORMATION

FEB 25 1985	Notice of Appeal to S.C.
	Preparing Proceedings on Certiorari
	Preparing Supp. Proceedings on Cert. 142
	Transmitting Orig. Exhibits to S.C.
10-15-84	Order of S.C.—Ext. to 11-20-84
11-19-84	Notice of Flg. of Cert. Pet. on 11-6-84 (USA)
2-25-85	Order of S.C. ☐ Denied ☒ Granted 2-19-85 (Lane, et al)
	Notice of Denial of Pet. for Rehearing
	Opinion of S.C. dated
	Judgment of S.C.
12-31-84	Notice of flg cert. on 12/7/84 (Lane, et al)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

UNITED STATES OF AMERICA

v.

JAMES C. LANE, JR.
DENNIS R. LANE

CR 2-83-012

RELEVANT DOCKET ENTRIES

06-08-83 Filed Sealed Indictment; issued Warrent.

06-08-83 Filed Return on Warrent, executed 6-9-83.

06-10-83 Filed Motion to Unseal Indictment.

06-15-83 Filed Order to Unseal Indictment. Indictment Unsealed cc attys)

06-15-83 Appearance Bond, deft placed on $20,000 unsecured bond. (cc to USPO, USM, AUSA)

06-15-83 ORDER SPECIFYING METHODS AND CONDITIONS OF RELEASE, Deft released 6-9-83. (cc to USPO, USM, AUSA)

6-16-83 ORDER that cause is set for trial Tuesday, July 19, 1983 at 9:30 a.m. Docket Call will be Monday, July 18, 1983 at 9:30 a.m. All pre-trial motions shall be filed with the Court on or before June 29, 1983. (cc attys)

6-24-83 ORDER that motion cutoff is extended and dfts are instructed to file any pre-trial motions on or before July 8, 1983. (cc attys)

6-27-83 APPLICATION FOR WRIT OF HABEAS CORPUS AD TESTIFICANDUM (Heard)

6-27-83 APPLICATION FOR WRIT OF HABEAS CORPUS AD TESTIFICANDUM (Lankford)

6-27-83 ORDER that pre-trial motions are set for hearing July 12, 1983 at 9:30 a.m. At the same time the Court will hear the matter of the propriety of joint representation of dfts pursuant to FRCP 44 (c). (cc attys—mailed 6-27-83)

6-27-83 ORDER that the Clerk is ORDERED to issue a writ of habeas corpus ad testificandum direct to the USM Northern District of Texas, the Federal Correctional Institution, Big Spring, TX, directing said officers to have said witness before this Court at Amarillo, TX on July 11, 1983, and directing that said witness be produced from day to day for as long as necessary and thereafter to return said witness under safe and secure conduct to said witness's place of custody or other appropriate authority. (cc attys) Lankford

6-27-83 ORDER that Clerk is ORDERED to issue a writ of habeas corpus ad testificandum directed to the USM for Northern District and the FCI, Ft. Worth, TX directing said officers to have said witness before this Court at Amarillo, TX on July 11, 1983 and directing that said witness be produced from day to day for as long as necessary and then return said witness under safe and secure conduct to witness's place of custody or other appropriate authority. (cc attys) (Heard)

6-27-83 Issued WRIT OF HABEAS CORPUS AD TESTIFICANDUM to appear before the Court of the Northern District at Amarillo on July 11, 1983. For *Sidney Heard*

6-27-83 Issued WRIT OF HABEAS CORPUS AD TESTIFICANDUM to appear before the Court of the Northern District at Amarillo on July 11, 1983 For *William K. Langford* [sent cc of both writs to USM, Dallas, DUSM Ama, Director FCI Ft. Worth, AUSA Lubbock.]

7-8-83 Dft's MOTION TO DISMISS Indictment w/Order

7-8-83 Dft's MEMO of Points and Authorities in Support of MO To Dismiss The Indictment

7-8-83 Dft's MO For Discovery and Inspection w/Order

7-8-83 Dft's BRIEF In Support of MO For Discovery and Inspection

7-8-83 Dft's MO For Disclosure by Prosecution of Evidence Favorable to the Accused w/Order

7-8-83 Dft's MO, James and Dennis, For Discovery of Grand Jury Testimony, w/Order

7-8-83 BRIEF In Support of MO For Discovery of Grand Jury Testimony

7-8-83 Dft James C. Lane's MO For Severance of Dfts w/Order

7-8-83 MEMO OF LAW In Support of MO For Severance of Dfts

7-8-83 Dfts' James and Dennis, MO For Separate Hearing to Determine the Existence of a Conspiracy or For Ordering Proof (ORder)

7-8-83 MEMO in Support of Dfts' MO For Separate Hearing to Determine the Existence of a Conspiracy or For Ordering Proof

7-8-83 First MO For Continuance of Dfts and Waiver of Speedy Trial w/Order

7-8-83 MO For Bill Of Particulars w/Order

7-8-83 MO For Severence and Separate Trial w/Order

7-8-83 MEMO In Support of Severance

7-8-83 Dfts James and Dennis MO For Enlargement of Time Within Which To File Additional Motions w/Order

7-8-83 MEMO in Support of Defts' MO For Enlargement of Time Within Which To File Additional Motions.

7-11-83 Government's Response to Dfts/ MO for Discovery & Inspection

7-11-83 Government's Response to Dfts' Mo for Disclsoure by prosecution of evidence favorable to the accused.

7-11-83 Government's Response to Dfts' Mo to Dismiss Indict.

7-11-83 Government's Response to Dfts' Mo for Bill of Particulars

7-11-83 Government's Response to Dft J.C. Lane, Jr.'s Mo for Severence and Separate Trials

7-11-83 Government's Response to Dfts' Motion for Severance of Dfts.

**7-8-83 (Filed in Lubbock) Government's MO TO INSTRUCT ATTYS, PARTIES, AND WITNESSES CONCERNING EXTRAJUDICIAL COMMUNICATIONS (ORDER)

**7-8-83 (Filed in Lubbock) MEMORANDUM IN SUPPORT OF GOV'T'S MO TO INSTRUCT ATTYS, PARTIES & WITNESSES CONCERNING EXTRAJUDICIAL COMMUNICATIONS

**7-8-83 (Filed in Lubbock) Gov't's MO FOR PRODUCTION, DISCOVERY & INSPECTION OF DEFTS' EVIDENCE. (ORDER)

**7-8-83 (Filed in Lubbock) Brief in Support of Gov't's Mo for Reciprocal Discovery.

7-11-83 Government's MOTION IN LIMINE w/Order ref. _____

7-11-83 BRIEF In Support of Government's MO in Limine

7-11-83 ORDER that dfts' Mo for Enlargement of Time within which to file additional motions is DENIED. (cc attys all attys called except Mr. Brown, unable to reach)

7-12-83 Government's Response to Dfts' James & Dennis, MO for Separate Hearing to Determine the Existence of a Conspiracy Or For Ordering Proof.

7-12-83 Government's Response to Dft Dennis Lane's MO for Severance of Dfts.

7-12-83 Hearing before the Court on Motions (1 hour)

7-12-83 ORDER that (1) Mo of US to Instruct attys, parties, and witnesses concerning extra-

judicial communications is granted and all parties are instructed not to communicate with the news media concerning the case without prior notice and approval by this Court; (2) Mo in Limine is Granted; (3) Motion for production, discovery and inspection of dft's evidence is granted; (4) Mo of dfts for disclosure by the prosecution is granted; (5) Mo of dfts for a Bill of Particulars is Denied; (6) Mo for discovery and inspection is Granted; (7) dfts' Mo for seperate hearing to determine the existence of a conspiracy or for ordering proof is Granted; (8) Mo for severance and separate trial is Denied; (9) Mo of dft James C. Lane, Jr. for severance of his trial is Denied; (10) Mo of dft Dennis R. Lane for severance is Denied; (11) dfts' Mo to Dismiss Indictment is Denied; (12) Mo of dft for a continuance scheduled on July 18, 1983 is denied but that case is set for trial on August 1, 1983. (cc attys—hand delivered to attys).

7-12-83	ORDER that dfts each expressly waived their right to separate representation. The Court finds that they have made a knowing and intelligent waiver and it is therefore, accepted. (cc attys)
7-26-83	Government's Response to Dfts' Amended MO To Dismiss Indictment.
7-26-83	Application for Permission to File Amended Motion to Dismiss Indictment
7-26-83	ORDER that dfts' application for permission to file an amended motion to dismiss indictment is GRANTED. (cc attys)
7-26-83	Amended Motion to Dismiss Indictment.
7-26-83	Memorandum of Authorities in support of Amended Motion to dismiss the Indictment.
8-1-83	Renewed Motion for Severance and Separate Trial prior to trial w/Order

8-1-83	Request to the Honorable Mary Lou Robinson, presiding Judge, to Interrogate the Jury.
8-1-83	Dft's Motion for Individual vior dire of jurors exposed to publicity w/Order
8-1-83	Memorandum in Support of dfts' Motion for Individual voir dire of jurors exposed to publicity
8-1-83	Dfts' Motion to Suppress Tape recordings w/Order
8-1-83	Dfts' Motion to Impeach w/Order
8-1-83	Memorandum in Support of Dfts' Motion to Impeach
8-1-83	Govt's Witness List
8-1-83	Govt's Exhibit List
8-1-83	Rec'd Govt's Requested Voir Dire Questions to Jury
8-1-83	Rec'd Govt's Requested Instructions
8-1-83	MOTION To LImit Number of Character Witness
8-1-83	ORDER that Motion to Dismiss Indictment is DENIED. (cc handed to attys in Courtroom)
8-1-83	Voir Dire Re-arraignment—Indictment read; Dfts plead Not Guilty Panel of 12 seated; 2 alternates Jury Trial begins (6 days)
8-1-83	Dfts' Memorandum in Support of Mo to Suppress Tape Recordings.
8-4-83	RETURN on subpoena served on Officer Larry Garrett on 8-4-83 RETURN on subpoena served on Officer Kenneth Tenbrink on 8-4-83
8-4-83	Rec'd Dfts Requested Charges/ handed to Judge
8-4-83	Renewed Motion for Severance and Separate Trial at close of Govt's evidence.
8-4-83	Motion for Judgment of Acquittal at close of Govt Evidence. w/Order

Memorandum in Support of dfts' motion for Judgment of Acquittal

8-4-83 ORDER that dfts' Motion for Judgment of Acquittal at close of govt's evidence is entered in relation to each Count of the Indictment DENIED as to Ct. 1; DENIED as to Ct. 2; DENIED at to Ct. 3; DENIED as to Ct. 4; DENIED as to Ct. 5; DENIED as to Ct. 6; as to those counts where the Court has overruled said motion, the dfts in open court excepted. (cc attys)

8-8-83 ORDER that requested instructions 1-13 were requested 8-5-83 and are ordered filed. (cc attys)

8-8-83 Court's Instructions to the Jury
Verdict of the Jury (GUILTY as to all counts)

New acco

8-11-83 Dfts/ Post-Trial Motion for Judgmnet of Acquittal w/Order

8-12-83 ORDER that motion for post=trial judgment of acquittal is DENIED (cc attys)

8-12-83 RETURN On Subpoena to Testify served on following named persons:
Earl D. Simpson 6-28-83
Ernest Luker 8-3-83
Radford J. Barrett 7-28-83
David Lard 6-28-83
Jack Stotts 6-28-83
Cecila Gail Mitchell 6-28-83
Sgt. M.G. Holmes 6-28-83
Joe Hart 6-28-83
Lesa Arterburn 6-28-83
Morris H. Loewenstern 6-28-83
William R. Taylor 6-29-83
Charles L. Baylor 6-28-83
Custodian Records/Texas Bank 6-29-83
Thomas V. McAlexander 6-28-83
Shirley Fielding 7-12-83

Andrew Lawson 7-8-83
Norman E. Adams 7-5-83
Custodian records/Tascosa Nat'l Bk 7-6-83
Earl D. Simpson 7-6-83
Ray Thompson 7-58-3
Ben Shaw 7-5-83
Sam B. Stewart 7-5-83
Janie Malone 7-5-83
Arch R. Moseley 6
28-83
William H. Liles 7-8-83
Roy Dwayne McDowell 7-26-83
Jerry Lehnick 7-28-83
Custodian records/Laramie Travelodge 7-8-83
Steve Messenger 7-28-83
Cindy Wright 7-28-83
David Morrow 7-25-83

8-15-83 Dfts' Motion for New Trial.

8-16-83 ORDER that Dfts' Motion for New Trial is DENIED. (cc attys)

8-22-83 Return on Writ of H/C Ad Testificandum of **William K. Lankford.**and **Sidney Heard.**

10-7-83 JUDGMENT AND COMMITMENT ORDER (MLR) that dft is 24 years of age at date of conviction and is eligible for handling under FYCA (18 U.S.C. §§ 5005-5024)

Dft is committed to the custoyf of AG on each of the five counts of the indictment under provisions of YCA; all counts to run concurrent.

10-17-83 Notice of Appeal

12-5-83 Reporter's Transcript (6 volumes)
Reporter's Transcript of Proceedings PreTrial Hearing (1 volume)

12-9-83 Transmitted file to 5th Circuit consisting of 2 Volumes pleadings, 6 Volumes Transcript, 1 Volume Pretrial Hearing Transcript and 2 containers of Exhibits. (cc ltr only to attys)

6-18-84 JUDGMENT that cause is reversed and remanded to U.S. Dist. Crt.
ISSUED AS MANDATE: July 11, 1984
Slip Opinion.

7-30-84 Returned pleadings, transcript and exhibits per 5th Cir. request.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

Criminal No. CR 2-83-01

[Filed June 8, 1983]

UNITED STATES OF AMERICA

v.

JAMES C. LANE, JR.
DENNIS R. LANE

The Grand Jury Charges:

COUNT 1

A. Introduction

1. Beginning on or about January 1, 1979, and continuing thereafter until on or about November 1, 1979, in the Amarillo Division of the Northern District of Texas, and elsewhere, the defendant, JAMES C. LANE, JR. knowingly devised and intended to devise a scheme and artifice to defraud and obtain money from Transamerica Insurance Group by means of false and fraudulent representations, well knowing at the time that such representations would be and were false and fraudulent when made.

2. At all material times herein, Transamerica Insurance Group was in the business of issuing policies of insurance generally providing for payment of claims to insured persons and entities as a result of bona fide losses incurred due to damage and destruction of insured property by fire.

3. It was part of the scheme and artifice to defraud and to obtain money by means of false and fraudulent representations, that:

(a) JAMES C. LANE, JR., defendant, caused a building located at 323 West 10th Street, Amarillo, Texas and its contents to be damaged by fire on or about February 28, 1979.

(b) JAMES C. LANE, JR., defendant, received and negotiated a draft issued by Transamerica Insurance Group,

Number 6739211, dated 04-23-79, in the amount of $10,000.00, payable to El Toro Restaurant.

(c) JAMES C. LANE, JR., defendant, received and negotiated a draft issued by Transamerica Group, Number 6833400, dated 11-01-79, in the amount of $2,699.00, payable to El Toro Restaurant.

B. On or about June 1, 1979, in the Northern District of Texas, JAMES C. LANE, JR., defendant, for the purpose of executing the aforesaid scheme and artifice to defraud, and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, and attempting to do so, wilfully and knowingly caused to be placed in an authorized depository for mail matter in the Amarillo Division of the Northern District of Texas, an envelope addressed to Transamerica Insurance Group, 4230 LBJ Freeway, Suite 600, Dallas, Texas 75234, which envelope contained a letter addressed to Transamerica Insurance Services, Dallas Branch, dated 6-1-79, signed by D. Lard and a letter addressed to Transamerica Insurance, signed by J. C. Lane, Jr., dated May 23, 1979, such envelope and contents to be sent and delivered by the United States Postal Service.

A violation of Title 18, United States Code, Sections 1341 and 2.

COUNT 2

A. Introduction

1. Beginning on or about January 1, 1980, and continuing thereafter until on or about December 31, 1980, in the Amarillo division of the Northern District of Texas, and elsewhere, JAMES C. LANE, JR., and DENNIS R. LANE, defendants, knowingly devised and intended to devise a scheme and artifice to defraud and to obtain money from Trinity Universal Insurance Company, by means of false and fraudulent representations, well knowing at the time that such representations would be and were false and fraudulent when made.

2. At all material times herein, Trinity Universal Insurance Company was in the business of issuing policies of insurance generally providing for payment of claims to insured

persons and entities as a result of bona fide losses incurred due to damage and destruction of insured property by fire.

3. It was part of the scheme and artifice to defraud and to obtain money by means of false and fraudulent representations, that:

(a) JAMES C. LANE, JR., and DENNIS R. LANE, defendants, caused a house located at 1105 South Jackson Street, Amarillo, Texas, and its contents to be damaged by fire on or about May 1, 1980.

(b) DENNIS R. LANE, defendant, and Andrew Lawson, doing business as L & L Properties submitted Proof of Loss forms to Trinity Universal Insurance Company and were paid a total of $24,250.00, as a result of the fire at 1105 South Jackson Street, Amarillo, Texas.

4. It was a further part of said scheme and artifice to defraud, that the defendants would and did obtain money from Trinity Universal Insurance Company by means of false, fraudulent, misleading pretenses and representations, well knowing at the time that the pretenses and representations would be and were false, fraudulent, and misleading when made, and such false, fraudulent, and misleading misrepresentations included, but were not limited to the following:

(a) DENNIS R. LANE, defendant, represented that the fire occurring at 1105 South Jackson Street, Amarillo, Texas, did not originate by any act, design or procurement of the insured and that no attempot had been made to deceive the insurance company as to the extent of the loss which resulted from the fire.

(b) JAMES C. LANE, Jr., and DENNIS R. LANE, defendants, submitted false invoices to Trinity Universal Insurance Company in support of the insurance claim to falsely represent that Trim-Tex had sold to L & L Properties, materials in the amount of $4,223.23 for the repair of the house at 1105 South Jackson Street, Amarillo, Texas.

B. On or about May 15, 1980, in the Amarillo Division of the Northern District of Texas, JAMES C. LANE, JR., and DENNIS R. LANE, defendants, for the purpose of executing the aforesaid scheme and artifice to defraud, and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, and attempting to

do so, wilfully and knowingly caused to be placed in an authorized depository for mail matter in the Amarillo Division of the Northern District of Texas, an envelope addressed to Trinity Universal Insurance Company, P.O. Box 225028, Dallas, Texas 75265, which envelope contained a report dated 5-15-80, signed by William H. Liles, a property loss notice concerning the fire at 1105 S. Jackson, Amarillo, Texas, dated 5-2-80, photographs, a floor plan diagram, and a partial proof of loss for $7,000.00, dated 5-9-80, signed by Dennis Lane and Andrew Lawson, such envelope and contents to be sent and delivered by the United States Postal Service.

A violation of Title 18, United States Code, Sections 1341 and 2.

COUNT 3

1. The Grand Jury realleges all of the allegations of the Introduction of Count 2 of this indictment.

2. On or about August 6, 1980, in the Amarillo Division of the Northern District of Texas, JAMES C. LANE, JR., and DENNIS R. LANE, defendants, for the purpose of executing the aforesaid scheme and artifice to defraud, and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, and attempting to do so, wilfully and knowingly caused to be placed in an authorized depository for mail matter in the Amarillo Division of the Northern District of Texas, an envelope addressed to Trinity Universal Insurance Company, P.O. Box 225028, Dallas, Texas 75265, which envelope contained a memo from Bill Liles, dated 8-6-80, and Proof of Loss forms in the amount of $3,000.00 and $2,000.00 signed by Dennis Lane, such envelope and contents to be sent and delivered by the United States Postal Service.

A violation of Title 18, United States Code, Sections 1341 and 2.

COUNT 4

1. The Grand Jury realleges all of the allegations of the Introduction of Count 2 of this indictment.

2. On or about September 18, 1980, in the Amarillo Division of the Northern District of Texas, JAMES C. LANE,

JR., and DENNIS R. LANE, defendants, for the purpose of executing the aforesaid scheme and artifice to defraud, and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, and attempting to do so, wilfully and knowingly caused to be placed an authorized depository for mail matter in the Amarillo Division of the Northern District of Texas, an envelope addressed to Trinity Universal Insurance Company, P.O. Box 225028, Dallas, Texas 75265, which envelope contained a memo from Bill Liles, dated 9-18-80, and biils concerning the repair and replacement of various items as a result of the fire at 1105 S. Jackson, Amarillo, Texas, such envelope and contents to be sent and delivered by the United States Postal Service.

A violation of Title 18, United States Code, Sections 1341 and 2.

COUNT 5

A. Beginning on or about May 1, 1980, and continuing thereafter until on or about March 25, 1981, in the Amarillo Division of the Northern District of Texas, and elsewhere, JAMES C. LANE, JR., DENNIS R. LANE, defendants, and others did unlawfully, knowingly, and wilfully combine, conspire, confederate, and agree together, with each other, and with other persons to commit certain offenses against the United States Code.

B. In order to effect the objects of the conspiracy, the defendants, JAMES C. LANE, JR., and DENNIS R. LANE, employed the following manner and means:

1. One or more of the conspirators would lease a building in Lubbock, Texas to open a flower shop.

2. One or more of the conspirators would furnish artificial flowers to stock the flower shop.

3. One or more of the conspirators would furnish false invoices to inflate the value of the inventory at the flower shop.

4. One or more of the conspirators would obtain insurance coverage on the inflated value of the inventory at the flower shop.

5. One or more of the conspirators would cause a fire to destroy the contents of the flower shop in order to submit an insurance claim and collect the insurance proceeds.

C. JAMES C. LANE, JR., and DENNIS R. LANE, defendants, and others, in furtherance of said conspiracy and to effect the objects thereof, did commit the following overt acts:

1. About May, 1980, Sidney J. Heard, William K. Lankford, and Dennis R. Lane met at L & L Designs, Amarillo, Texas, to discuss a scheme to defraud an insurance company.

2. On or about July 10, 1980, DENNIS R. LANE leased a building at 3602 Avenue A, Lubbock, Texas.

3. On or about July 29, 1980, DENNIS R. LANE and JAMES C. LANE, JR., signed a lease agreement and mailed it to Carolyn Moseley, 3602 Avenue A, Lubbock, Texas, on or about August 1, 1980.

4. About August, 1980, William K. Lankford delivered flower arrangements and related materials to DENNIS R. LANE at 3602 Avenue A, Lubbock, Texas.

5. On or about September 1, 1980, William K. Lankford, in Amarillo, Texas, prepared L & L Designs, Inc. invoice number 320, in the amount of $2,509.30 to Lane's Flower Design, 3602 Avenue A, Lubbock, Texas and gave the invoice to Sidney J. Heard for delivery to DENNIS R. LANE.

6. In October, 1980, William K. Lankford, in Amarillo, Texas, prepared five fictitious invoices to Lane's Flower Design, 3602 Avenue A, Lubbock, Texas, to inflate the value of the inventory.

7. On or about November 10, 1980, JAMES C. LANE, JR., contracted Sam Stewart of Stewart Insurance Agency, Claude, Texas to arrange for insurance coverage on the inventory of Lane's Flower Design, 3602 Avenue A, Lubbock, Texas, in the amount of $50,000.00, with American States Insurance Company.

8 On or about November 12, 1980, William K. Lankford, in Amarillo, Texas, prepared invoice number 376, in the amount of $20,213.70, to Lane's Flower Design, 3602 Avenue A, Lubbock, Texas and a General Promissory Note to reflect a debt of $20,213.70.

9. On or about November 12, 1980, William K. Lankford delivered invoice number 376 and the General Promissory Note in the amount of $20,213.70 to the residence of Sidney J. Heard in Amarillo, Texas.

10. On or about December 9, 1980, DENNIS R. LANE issued check number 1067 on account number 05-689-8, styled L & L Properties, at Tascosa National Bank, Amarillo, Texas, in the amount of $125.40, made payable to Stewart Insurance.

A violation of Title 18, United States Code, Section 371.

COUNT 6

1. On or about May 12, 1981, in the Amarillo Division of the Northern District of Texas, DENNNIS R. LANE, defendant, while under oath in a proceeding before the Grand Jury of the United States of America, duly impaneled and sworn in the United States District Court for the Northern District of Texas, knowingly did make a false material declaration, that is to say:

2. At the time and place aforesaid, the Grand Jury was conducting an investigation to determine whether or not there had been committed in the Northern District of Texas violations of mail fraud and conspiracy in violation of Title 18, United States Code, Sections 1341 and 371 and other criminal statutes of the United States.

3. It was material to the aforesaid investigation to determine whether or not Sidney Heard was associated with DENNIS R. LANE, defendant, and William K. Lankford, in establishing a flower shop in Lubbock, Texas, that was to be burned as part of a scheme to obtain the insurance on the contents of the said flower shop.

4. At the time and place aforesaid, DENNIS R. LANE, defendant, while under oath, did knowingly declare before the said Grand Jury with respect to the aforesaid material matter, as follows:

Q. Did Mr. Heard have anything to do with this flower shop?

A. No, sir.

Q. Did he have anything to do with your dealings with Mr. Lankford?

A. No, sir.

5. The aforesaid testimony of DENNIS R. LANE, defendant, as he then and there well knew and believed, was false in that between on or about May 1, 1980, and on or about March 25, 1981, DENNIS R. LANE, defendant, and William K. Lankford were associated with Sidney Heard in establishing a flower shop in Lubbock, Texas, as part of a scheme to defraud by burning this said flower shop and falsely collecting on the insurance policy covering the contents of the said flower shop.

All in violation of Title 18, United States Code, Section 1623.

A TRUE BILL

FOREMAN

/S/ James A. Rolfe
JAMES A. ROLFE
United States Attorney

/S/ Roger L. McRoberts
ROGER L. MCROBERTS
Assistant United States Attorney
Room C-201, 1205 Texas Avenue
Lubbock, Texas 79401
806/743-7351

[95] * * * * *

THE COURT:

Ladies and Gentlemen of the Jury, you've been hearing some evidence concerning a restaurant called El Toro. Now, you are instructed that you'll not consider the evidence with regard to El Toro when you consider the charges against Dennis A. Lane ... is it Dennis A. or Dennis R.?

MR. BROWN: Dennis R., Your Honor.

THE COURT: You'll not consider that evidence in [96] considering the changes against Dennis R. Lane.

[984] * * * * *

Now, as you know, there are two Defendants on trial here: James C. Lane, Jr., and Dennis R. Lane.

[985] They are being tried together because they are both charged in Counts 2 through 5 of the indictment.

Nevertheless, each Defendant is entitled to have his case decided just on the evidence which applies to him.

Some of the evidence in this case was limited to one of the Defendants and can not be considered in the case of the other.

The testimony that you heard concerning a fire at El Toro may not be considered as any evidence of the guilt of the Defendant, Dennis R. Lane.

You may not consider it in any way when you are deciding whether the Government has proved, beyond a reasonable doubt, that the Defendant Dennis R. Lane, committed the crimes charged in Counts 2 through 6 of the indictment.

Now, if the Government fails to prove any one of the necessary elements of any count, as to any Defendant charged in that count, beyond a reasonable doubt, then you should acquit that Defendant as to that count and find him not guilty as to that count.

* * * * *

[964] Now, the Defendants are charged in Counts 1, 2, 3 and 4 of the indictment with having violated Title 18, United States Code, Sections 1341 and 2. Section 1341 of Title 18,

United States Code, provided in its essential part that: Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises ... for the purpose of executing such scheme or [965] artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department shall be guilty of an offense against the laws of the United States.

Section 2 of Title 18, United States Code, reads in its essential part that (a) Whoever commits an offense against the United States or aides, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Now, in reading this, it said the Defendants are charged in Counts 1, 2, 3 and 4 of the indictment. Actually, of course, Dennis R. Lane is not charged in Count 1 of the indictment. Both Defendants are charged in Counts 2, 3 and 4 of the indictment.

Now, as to Counts 1, 2, 3 and 4 in the indictment, it is necessary that the Government prove from the evidence beyond a reasonable doubt that (1) The Defendants wilfully and knowingly devised a scheme or artifice to defraud, or for the obtaining of money or property by means of false pretenses, representations, [966] or promises, and (2) The Defendants used the United States Postal Service by mailing, or causing to be mailed, some matter or thing for the purpose of executing the scheme to defraud.

The words "scheme" and "artifice" include any plan or course of action intended to deceive others, and to obtain, by false or fraudulent pretenses, representations, or promises, money or property from persons so deceived.

Now, a statement or representation is "false" or "fraudulent" within the meaning of this statute if it relates to a material fact and is known to be untrue or is made with reckless indifference as to the truth or falsity, and is made or caused to be made with intent to defraud.

Now, a statement or representation may also be "false" or "fraudulent" when it constitutes a half truth, or effectively conceals a material fact, with intent to defraud.

Now, a "material fact" is a fact that would be important to a reasonable person in deciding whether to engage or not to engage in a particular transaction.

Now, to act with "intent to defraud" means to act knowingly and with the specific intent to deceive, ordinarily for the purpose of causing some financial [967] loss to another or bringing about some financial gain to one's self.

It is not necessary that the Government prove all of the details alleged in the purpose of the scheme; or that the material mailed was itself false or fraudulent; or that the alleged scheme actually succeeded in defrauding anyone; or that the use of the mail was intended as the specific or exclusive means of accomplishing the alleged fraud.

What must be proved beyond a reasonable doubt is that the accused knowingly and wilfully devised or intended to devise a scheme to defraud substantially the same as the one alleged in the indictment; and that the use of the United States mails was closely related to the scheme in that the accused either mailed something or caused it to be mailed in an attempt to execute or carry out the scheme.

Now, to "cause" the mails to be used is to do an act with knowledge that the use of the mails will follow in the ordinary course of the business or where such use can reasonably be foreseen.

Now, each separate use of the mails in furtherance of a scheme to defraud constitutes a separate offense.

Now, to use the mail can not be for the purpose of executing such scheme as alleged in the indictment, [968] if the alleged scheme in its entirety was completed prior to the mailing alleged in the indictment.

Therefore, if you find from the evidence beyond a reasonable doubt that the Defendants devised and intended to devise a scheme or artifice to defraud, or to obtain money by means of false or fraudulent pretenses, representations or promises, as alleged in the indictment, but if you further find from a preponderance of the evidence, that the alleged scheme in its entirety had been completed prior to the al-

leged mailing, so that the use of the mail, if any, by the Defendants, was not for the purpose of executing the scheme, or if this evidence causes you to have a reasonable doubt, you shall acquit the Defendants, and say by your virdict, "not guilty."

Now, however, mailings made to promote the scheme or which relate to the acceptance of the proceeds of the scheme or which facilitate concealment of the scheme are mailings in furtherance of the scheme.

* * * * *

Supreme Court of the United States

No. 84-744

UNITED STATES, PETITIONER,

v.

JAMES C. LANE AND DENNIS R. LANE

ORDER ALLOWING CERTIORARI.
Filed February 19, 1985.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. This case is consolidated with case No. 84-963, *James C. Lane and Dennis R. Lane* v. *United States*, and a total of one hour is allotted for oral argument.

Justice Powell took no part in the consideration or decision of this petition.

Supreme Court of the United States

No. 84-963

JAMES C. LANE AND DENNIS R. LANE, PETITIONERS

v.

UNITED STATES

ORDER ALLOWING CERTIORARI

Filed February 19, 1985.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. This case is consolidated with case No. 84-744, *United States* v. *James C. Lane and Dennis R. Lane*, and a total of one hour is allotted for oral argument.

Justice Powell took no part in the consideration or decision of this petition.

APR 26 1985
ALEXANDER L. STEVAS
CLERK

Nos. 84-744 and 84-963

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES C. LANE AND DENNIS R. LANE

JAMES C. LANE AND DENNIS R. LANE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in reversing defendants' convictions on the basis of misjoinder under Rule 8 of the Federal Rules of Criminal Procedure without determining whether the misjoinder constituted harmless error.

2. Whether there was sufficient evidence to support defendants' convictions for mail fraud under 18 U.S.C. 1341.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

Constitution, statutes and rules:

Miscellaneous:

Miscellaneous—Continued: Page

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UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a)[1] is reported at 735 F.2d 799.

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[1] The appendices to each petition are identical.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21a) was entered on June 18, 1984. A petition for rehearing was denied on August 22, 1984 (Pet. App. 22a-23a). On October 11, 1984, Justice White extended the time in which to file the government's petition for a writ of certiorari to November 20, 1984, and the petition was filed on November 6, 1984. The defendants' cross-petition for a writ of certiorari was filed on December 7, 1984. The petitions were granted on February 19, 1985 (J.A. 25, 26). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND RULES INVOLVED

18 U.S.C. 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Fed. R. Crim. P. 8 provides:

> (a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series or acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Fed. R. Crim. P. 52(a) provides:

> Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Texas, James C. (J.C.) Lane was convicted on four counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of conspiracy, in violation of 18 U.S.C. 371. He was sentenced to concurrent terms of five years' imprisonment on the first mail fraud count and on the conspiracy count, to be followed by concurrent terms of

two years' imprisonment on the other three mail fraud counts, and fined a total of $9,000. His son, Dennis R. Lane, was convicted on three counts of mail fraud, one count of conspiracy, and one count of perjury, in violation of 18 U.S.C. 1623. Pursuant to the Young Adult Offender Act, he was sentenced to concurrent terms of custody under the Youth Corrections Act (18 U.S.C. 4216, 5010(b)).[2] See Pet. App. 8a n.5. The court of appeals reversed (*id.* at 1a-20a).

A. The Factual Background

Defendants were each charged in five counts of a six-count indictment encompassing three arson-for-profit schemes (J.A. 13-20). Count 1 charged J.C. Lane with mail fraud in connection with a 1979 fire in the El Toro restaurant in Amarillo, Texas. Counts 2 through 4 charged both defendants with mail fraud in connection with a 1980 fire in a duplex in Amarillo. Count 5 charged both defendants with conspiracy in connection with the planned arson of a flower shop in 1980 in Lubbock, Texas. Count 6 charged Dennis Lane with perjury before a grand jury investigating the flower shop scheme in 1981. Defendants' motions for severance before and during trial were denied. They were tried jointly and convicted on all counts. Pet. App. 8a.

1. *The El Toro Restaurant Fire*

The evidence at trial showed that J.C. Lane and three partners opened the El Toro restaurant in Amarillo in the summer of 1978. They leased the

[2] The Young Adult Offender Act and the Youth Correction Act were repealed by Section 218(a)(5) and (8) of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2027.

building and restaurant equipment for a term of five years. Pet. App. 2a; Tr. 35-37. A clause in the lease provided that it would be terminated under certain circumstances in the event of a fire (Tr. 37; GX 1). The restaurant never operated at a profit, suffering declining sales after September 1978 and sustaining losses of $20,000 during 1978 and $9,000 during the two months that it operated in 1979 (Pet. App. 2a, 3a n.1; Tr. 142-151).

J.C. Lane purchased fire insurance for the restaurant in November 1978, covering the contents and improvements for $10,000 each and providing a maximum of $18,000 for business losses. At about the same time he contacted Sidney Heard, a professional "torch," asking him how much it would cost to burn the building and stating that he wanted to get out of his lease and the partnership.[3] Heard set a fire in the building on February 27, 1979, which did not destroy it but did damage its contents. Pet. App. 2a; Tr. 237-242.

The insurance company settled with Lane for $10,000 on the building's contents and $9,200 on the improvements. Drafts in these amounts were issued by the company on April 23, 1979, and May 3, 1979, respectively. Pet. App. 2a; Tr. 106-108; GX 9-12. On June 1, 1979, the insurance adjustor mailed a memorandum to the company's regional headquarters concerning settlement of Lane's business-interruption claim. Included with the memorandum was a list of the restaurant's monthly income and expenses sub-

[3] Evidence of Heard's prior dealings with J.C. Lane in connection with two other arsons was excluded by the trial court (Tr. 229, 370-376). Heard, who testified at trial, had entered into a plea agreement with the government (Tr. 265-275, 605-606).

mitted and signed by J.C. Lane, falsely claiming a net monthly profit of $2,500. Pet. App. 2a-3a; Tr. 74-76; GX 13. This mailing was charged in count 1 of the indictment (J.A. 14). On November 1, 1979, the business-interruption claim was settled for $2,700, and the insurance company issued to Lane a draft for that amount on that date. Pet. App. 3a; Tr. 77-78; GX 15.

Dennis Lane was not involved in the restaurant arson. At the time the evidence relating to this count was received, the trial judge instructed the jury that the evidence was not to be considered against him (J.A. 21). The judge repeated this instruction in her final charge, together with an instruction regarding the separate consideration to be given each defendant and each count (*ibid.*).

2. *The Duplex Fire*

In early 1980, J.C. Lane hired Heard to set fire to a duplex that Lane was moving to a vacant lot in Amarillo (Pet. App. 3a; Tr. 243-245). The duplex was owned by Dennis Lane and Andrew Lawson, doing business as L & L Properties. On January 22, 1980, J.C. Lane obtained a $35,000 fire insurance policy on the building, which had been purchased for $500. Pet. App. 3a; Tr. 50-52, 57. The duplex was burned on May 1, 1980, by Marvin McFarland, an employee of Heard's (Pet. App. 4a; Tr. 246-250, 319-320). A week or two later, J.C. Lane told Heard that, as the building was not a total loss, he planned to "'stick it to'" the insurance company by submitting repair invoices for reimbursement (Tr. 250).

On May 9, 1980, the insurance adjustor issued an initial draft of $7,000 on the policy to Dennis Lane and his partner Lawson as an advance for repairs to

the duplex. At the same time, Lane and Lawson signed a proof-of-loss form claiming a partial loss of $7,000 and stating that the "'loss did not originate by any act, design or procurement on the part of your insured or this affiant'" and that "'no attempt to deceive [the] company as to the extent of the loss has been made.'" On May 15, 1980, the adjustor mailed to the insurance company's headquarters a report on expected repair costs that had been submitted by Dennis Lane along with his partial proof-of-loss form. Pet. App. 4a; Tr. 165-168; GX 34A-34E, 35. This mailing was charged in count 2 of the indictment (J.A. 15-16).

On May 21 and 30, 1980, the adjustor issued additional drafts to the insured for $2,000 and $3,000, respectively. Dennis Lane submitted to the adjustor proof-of-loss forms corresponding to each payment. On May 25, 1980, the adjustor mailed Lane's $2,000 proof-of-loss form to company headquarters, together with a memorandum indicating that repairs were in progress and had exceeded the initial $7,000 advanced earlier. On August 6, 1980, the adjustor mailed another progress report to headquarters, along with Lane's $3,000 proof-of-loss form and an additional $2,000 proof-of-loss form.[4] Pet. App. 4a-5a; Tr. 171-175; GX 37-38, 39A-39C. The August 6 mailing was charged in count 3 of the indictment (J.A. 16).

On September 16, 1980, the adjustor issued to Dennis Lane a draft for $12,250, representing final

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[4] It is not clear from the record whether this claim is the same as that represented by the $2,000 proof-of-loss form mailed on May 25, 1980. The court of appeals assumed, and we do not dispute, that the proof-of-loss forms mailed on August 6, 1980 related to the drafts issued earlier. See Pet. App. 5a n.3, 15a-16a n.10.

settlement of his claims relating to the duplex and bringing the total amount paid to over $24,000 (Pet. App. 5a; Tr. 175-176; GX 40). Two days later, the adjustor mailed a memorandum to company headquarters explaining the high total cost of restoration (the original estimate had been for $14,000) on the basis of roof damage that had required additional repairs. The adjustor included in his report a number of invoices supplied by Dennis Lane that listed various materials and furniture purportedly purchased by L & L Properties to repair and refurbish the duplex. Pet. App. 5a; Tr. 176-183; GX 41A-41N. In fact, the invoices had been fabricated by J.C. Lane together with Heard and his secretary (Pet. App. 5a; Tr. 250, 256-262; GX 45-56). The September 18 mailing was the subject of count 4 of the indictment (J.A. 16-17).

3. *The Flower Shop Conspiracy*

At a meeting with defendants and Lawson several weeks after the duplex fire, Heard proposed that they establish and burn a phony flower shop in Lubbock. The Lanes agreed to participate in the plan. Heard's associate, William Lankford, who operated L & L Designs, an artificial-flower business in Amarillo, agreed to stock the Lubbock shop with old flowers and broomweed. Heard and Dennis Lane picked out a suitable building in July 1980, which Lankford stocked in August. Pet. App. 5a-6a; Tr. 251-255, 275-277, 286-287. Lankford prepared fictitious invoices for merchandise purportedly delivered to the shop. In November 1980, J.C. Lane insured the contents of the shop for $50,000. Heard was later arrested and Lankford questioned with respect to an unrelated crime, and the planned arson of the flower shop never took place. Pet. App. 7a; Tr. 400-402, 458-459, 475-476, 479. The flower

shop conspiracy was charged in count 5 of the indictment (J.A. 17-19).

4. *Dennis Lane's Perjury*

In March 1981, a newspaper article connected Dennis Lane to a scheme to burn the Lubbock flower shop with Heard. The same day that the article appeared, J.C. Lane cancelled the insurance policy on the shop. Pet. App. 7a; Tr. 406, 416-417. On May 12, 1981, Dennis Lane appeared before a grand jury investigating Heard. He testified that Heard had nothing to do with the flower shop or with his own dealings with Lankford. Pet. App. 7a-8a; Tr. 548-549; GX 92A, at 68. On the basis of this testimony, Dennis Lane was charged with perjury in count 6 of the indictment (J.A. 19-20).

B. The Court Of Appeals' Decision

1. The court of appeals reversed defendants' convictions, holding (Pet. App. 9a) that count 1 "should not have been joined with the others [under Fed. R. Crim. P. 8(b)] because it was not part of the same series of acts or transactions as Counts 2 through 6." The court reasoned that the El Toro restaurant fire was entirely separate from the other crimes and that it was not linked to them by any common scheme or plan (Pet. App. 9a-13a). The court did conclude, however, that counts 2 through 6 were properly joined (*id.* at 13a).

The court refused to consider the government's argument that the error, if any, was harmless. Stating only that "Rule 8(b) misjoinder is prejudicial *per se* in this circuit" (Pet. App. 13a) and that misjoinder is "inherently prejudicial" (*id.* at 10a), the court remanded for new trials on all counts. Under

the court's ruling (*id.* at 13a), defendants on remand may be tried jointly on counts 2 through 6, with a separate trial for J.C. Lane on count 1.[5]

2. The court of appeals rejected the Lanes' contention that the evidence was insufficient to support their mail fraud convictions on counts 2 through 4, which involved the 1980 duplex fire in Amarillo (Pet. App. 15a-18a).[6] Defendants argued that the charged mailings could not have been in furtherance of their fraudulent scheme because each took place after the insurance company had issued to them the draft related to the mailed proof-of-loss forms or invoices (*id.* at 16a). In rejecting this argument, the court of appeals relied on this Court's decision in *United States* v. *Sampson*, 371 U.S. 75 (1962), reasoning that mailings occurring after payment may be "in execution of fraud" where they are "designed to lull the victims into a false sense of security and postpone investigation" (Pet. App. 17a). The court of appeals concluded that the evidence supported a jury

[5] Alternatively, although the court of appeals did not address the issue, it seems clear under Fed. R. Crim. P. 8(a) that count 1 could properly be joined with counts 2 through 5 at a trial of J.C. Lane alone. Accordingly, each defendant may be tried on all his charges at a trial separate from that of the other defendant's.

[6] The court of appeals also rejected J.C. Lane's challenge to the sufficiency of the evidence supporting his conviction on count 1 (the restaurant fire) (Pet. App. 13a-15a) and Dennis Lane's challenge to the sufficiency of the evidence supporting his conviction for perjury (*id.* at 18a-20a), challenges that they do not renew in this Court (see 84-963 Cross-Pet. 3). Defendants did not argue in the court of appeals, and do not now argue, that the evidence was insufficient to support their convictions for conspiracy in connection with the planned flower shop arson (see Pet. App. 20a n.13).

inference that the charged mailings "were intended to and did have a lulling effect" because they helped to convince the insurance company that "the claims were legitimate" (*id.* at 17a-18a (footnote omitted)).[7] The court reasoned (*id.* at 18a):

> The Proofs of Loss declared that the "loss did not originate by any act, design or procurement on the part of [the] insured" and that no attempt had been made to deceive the insurance company. [The company] required the insured to submit the forms; any failure to comply might have alerted [it] to the possibility of fraud.
>
> Similarly, the invoices gave the impression of a perfectly innocent claim. The building supplies and furniture that Lane claimed to have purchased for the duplex were set out in minute

[7] The court of appeals noted (Pet. App. 17a n.11) that the district court's instructions accorded with this view of the law. Defendants did not challenge the jury instructions in the court of appeals and do not appear to do so in this Court. The district court instructed the jury that each charged mailing must be "for the purpose of executing the scheme to defraud" (J.A. 22) and that "the use of the United States mails [must be] closely related to the scheme in that the accused either mailed something or caused it to be mailed in an attempt to execute or carry out the scheme" (J.A. 23). The district court further instructed the jury that a use of the mails "can not be for the purpose of executing such scheme as alleged in the indictment * * * *if the alleged scheme in its entirety was completed prior to the mailing alleged in the indictment.*" *Ibid.* (emphasis added). The district court also stated to the jury that mailings "which relate to the acceptance of the proceeds of the scheme or which facilitate concealment of the scheme are mailings in furtherance of the scheme" (J.A. 24).

> detail. The invoices were dated randomly and torn out of the invoice book at random points to indicate that L & L Properties was not the sole customer of the [alleged supplier]. A reasonable jury could find that all of these details were intended to lull [the insurance company] into a false sense of security.

SUMMARY OF ARGUMENT

I

Rule 52(a) of the Federal Rules of Criminal Procedure requires a reviewing court to disregard "[*a*]*ny* error * * * which does not affect substantial rights" (emphasis added). This Court has similarly made it clear that "it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless." *United States* v. *Hasting*, 461 U.S. 499, 509 (1983). There is no rational basis for holding that this duty does not extend to violations of Fed. R. Crim. P. 8—indeed, misjoinder is a garden variety technical error that, while sometimes prejudicial to the defense, is not inherently associated with prejudice. Those courts of appeals that review joinder errors for potential prejudice have had no difficulty in assessing on a case by case basis the harmfulness of misjoinders under Rule 8, just as they have routinely determined whether a joinder of offenses or defendants that Rule 8 authorizes has in a particular case given rise to such prejudice that a severance is mandated under Fed. R. Crim. P. 14. Application of the harmless error rule to questions of joinder will further the purposes of both Rule 8 and Rule 52(a) without sacrificing any interest of defendants in a fair trial.

There is no reason for excepting misjoinder from the operation of the harmless error requirement. The Court has applied the harmless error rule even to most constitutional errors, exempting only a narrow class of cases, such as deprivation of the assistance of counsel or trial before a biased tribunal, in which the error by its nature inescapably taints the entire proceeding. It would be incongruous indeed to conclude that misjoinder (which is not a constitutional error) is somehow exempt from this fundamental principle of appellate review. The fact that a trial court has no discretion to refuse a severance of misjoined charges or defendants is immaterial to the present inquiry; that may establish the existence of error without regard to consideration of prejudice, but of course the presence of error is an inevitable ingredient of the harmless error doctrine, not a factor rendering the doctrine inapplicable. Recognition of the duty to apply the harmless error doctrine here will not render Rule 8 redundant with Rule 14, nor is it foreclosed by the Court's decision in *McElroy* v. *United States*, 164 U.S. 76 (1896), rendered before the first statute prohibiting reversal of judgments for nonprejudicial errors.

While the Court may wish to remand this case to the court of appeals for consideration of the harmfulness of the error here, we think it plain that the joinder of count 1 with counts 2 through 6 did not materially prejudice defendants in light of the overwhelming evidence of their guilt, the district court's limiting instructions, and the admissibility of the same evidence on separate retrials.

II

The evidence is clearly sufficient to support defendants' convictions for mail fraud in connection with the duplex arson. The charged mailings did not take place after defendants had fully secured the proceeds of their fraudulent scheme. Even if they had, the mailings were "for the purpose of executing" that scheme within the meaning of 18 U.S.C. 1341 because they helped to lull the insurance company into believing that defendants' claim was a valid one and thereby served to make detection of the scheme less likely. See *United States* v. *Sampson*, 371 U.S. 75 (1962). This Court's decision in *United States* v. *Maze*, 414 U.S. 395 (1974), is not to the contrary, because the mailings there increased rather than decreased the likelihood that the defendant's scheme would be discovered, and so could not have been in furtherance of that scheme. The policy behind Section 1341, to prohibit all fraudulent uses of the federal mails and thereby to protect the public, clearly would be contravened by creating the exception from its provisions that defendants here seek to establish.

ARGUMENT

I. A CONVICTION MAY NOT BE REVERSED ON THE BASIS OF MISJOINDER UNDER RULE 8 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE IF THE ERROR WAS HARMLESS

The court of appeals erred in refusing to consider whether the misjoinder of count 1 under Fed. R. Crim. P. 8(b)[8] constituted harmless error. Although

[8] Although we believe, as we argued to the court of appeals, that the joinder here was permissible under Rule 8(b), we have not presented that largely factual question to this

the circuits are divided on the question, the better reasoned and more recent line of cases supports application of the harmless error standard of Fed. R. Crim. P. 52(a) to misjoinder under Rule 8.[9] There

Court. Rather than treating the question solely under Rule 8(b) (see Pet. App. 9a), the court of appeals arguably should have determined under Rule 8(b) that the defendants were properly joined because they "participated in the same act or transaction or in the same series of acts or transactions," and then determined under Rule 8(a) that the offenses charged against each defendant were properly joined. Count 1 would plainly have been properly joined on this analysis because the El Toro restaurant fraud was, under Rule 8(a), "of the same or similar character" as the duplex fraud and flower shop scheme. While it is "quite possible" that the Rule's drafters intended such an approach, the courts of appeals have consistently analyzed all joinder questions involving multiple defendants under Rule 8(b) alone. 1 C. Wright, *Federal Practice and Procedure: Criminal* § 144, at 494 & n.1 (1982) (citing cases); see also 8 J. Moore, *Moore's Federal Practice* ¶ 8.05[1], at 8-19 (2d ed. 1984). In considering whether the harmless error rule applies to misjoinder, it should make no difference whether the joinder question arises under Rule 8(a) or Rule 8(b). See, *e.g.*, *United States* v. *Ajlouny*, 629 F.2d 830, 843 (2d Cir. 1980) (treating issue as one under Rule 8 and citing precedents addressing both sections of the Rule), cert. denied, 449 U.S. 1111 (1981).

[9] For the view that misjoinder may constitute harmless error, see, *e.g.*, *United States* v. *Ajlouny*, 629 F.2d 830, 843 (2d Cir. 1980), cert. denied, 449 U.S. 1111 (1981); *United States* v. *Werner*, 620 F.2d 922, 926 (2d Cir. 1980); *United States* v. *Turbide*, 558 F.2d 1053, 1061 (2d Cir.), cert. denied, 434 U.S. 934 (1977); *United States* v. *Granello*, 365 F.2d 990, 995 (2d Cir. 1966), cert. denied, 386 U.S. 1019 (1967); *United States* v. *Seidel*, 620 F.2d 1006 (4th Cir. 1980); *United States* v. *Bibby*, 752 F.2d 1116, 1121-1122 (6th Cir. 1985); *United States* v. *Hatcher*, 680 F.2d 438, 442 (6th Cir. 1982); *United States* v. *Varelli*, 407 F.2d 735, 747-748 (7th Cir. 1969); *United States* v. *Martin*, 567 F.2d 849, 854

is nothing peculiar to questions of joinder that warrants excepting them from the general rule, embodied in statutory directives, that courts of appeals have a duty to disregard all trial errors that did not affect a defendant's substantial rights. Indeed, application of the harmless error rule to misjoinder will further the salutary purposes both of Rule 8 and of Rule 52(a). This is shown especially clearly in this case, as it is beyond question that the defendants were not materially prejudiced by the trial of count 1 together with counts 2 through 6.

A. Federal Appellate Courts Have A Duty To Disregard All Harmless Errors, Including Misjoinder

Rule 52(a) of the Federal Rules of Criminal Procedure directs that "[*a*]*ny* error * * * which does not affect substantial rights *shall* be disregarded"

(9th Cir. 1977); *Baker* v. *United States*, 401 F.2d 958, 972-974 (D.C. Cir. 1968). Except for the Second Circuit, each of these courts of appeals reversed a previously taken position that misjoinder is prejudicial per se. See, *e.g.*, *Ingram* v. *United States*, 272 F.2d 567 (4th Cir. 1959); *United States* v. *Sutton*, 605 F.2d 260, 272 (1979), on reh'g, 642 F.2d 1001 (6th Cir. 1980), cert. denied, 453 U.S. 912 (1981); *United States* v. *Gougis*, 374 F.2d 758, 762 (7th Cir. 1967); *Metheany* v. *United States*, 365 F.2d 90, 94-95 (1966), later appeal, 390 F.2d 559 (9th Cir.), cert. denied, 393 U.S. 824 (1968); *Ward* v. *United States*, 289 F.2d 877, 878 (D.C. Cir. 1961). For cases still adhering to that position, see, *e.g.*, *United States* v. *Turkette*, 632 F.2d 896, 906 & n.35 (1st Cir. 1980), rev'd on other grounds, 452 U.S. 576 (1981); *United States* v. *Bova*, 493 F.2d 33 (5th Cir. 1974); *United States* v. *Bledsoe*, 674 F.2d 647, 654, 657-658 (8th Cir.), cert. denied, 459 U.S. 1040 (1982); *United States* v. *Eagleston*, 417 F.2d 11, 14 (10th Cir. 1969); *United States* v. *Ellis*, 709 F.2d 688, 690 (11th Cir. 1983); see also *United States* v. *Graci*, 504 F.2d 411, 414 (3d Cir. 1974).

(emphasis added). To similar effect, 28 U.S.C. 2111 enjoins federal appellate courts to "give judgment * * * without regard to errors or defects which do not affect the substantial rights of the parties."[10] In *United States* v. *Hasting*, 461 U.S. 499, 509 (1983), this Court made it clear that "it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless." See also, *e.g.*, *Brown* v. *United States*, 411 U.S. 223, 230-232 (1973); *Milton* v. *Wainwright*, 407 U.S. 371 (1972); *Harrington* v. *California*, 395 U.S. 250 (1969); *Chapman* v. *California*, 386 U.S. 18 (1967); *Kotteakos* v. *United States*, 328 U.S. 750 (1946).

The harmless error rule as expressed in Fed. R. Crim P. 52(a), 28 U.S.C. 2111, and this Court's decisions admits of no exception for claims of improper joinder. To carve out such an exception, requiring a new trial even though the asserted misjoinder was harmless error, would be inconsistent with the beneficial purposes of both Rule 52(a) and Rule 8. As the Court noted in *Hasting*, the purpose of the harmless error rule is " 'to conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error.' " 461 U.S. at 509, quoting R. Tray-

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[10] Congress intended that 28 U.S.C. 2111 would assure that the harmless error rule apply in appellate as well as trial courts. H.R. Rep. 352, 81st Cong., 1st Sess. 18 (1949). Both Rule 52(a) and Section 2111 are based on former 28 U.S.C. (1946 ed.) 391, which provided that judgment be given "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." Significantly, both Rule 52(a) and Section 2111 omit the limitation that only "technical" errors be subject to the harmless error standard. See generally *Hasting*, 461 U.S. at 509-510 n.7.

nor, *The Riddle of Harmless Error* 81 (1970); see *Kotteakos*, 328 U.S. at 758-760. In the context of a criminal prosecution, the harmless error rule recognizes that "justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934) (Cardozo, J.); see also *Bruton* v. *United States*, 391 U.S. 123, 135 (1968) ("'A defendant is entitled to a fair trial but not a perfect one,'" quoting *Lutwak* v. *United States*, 344 U.S. 604, 619 (1953)). The interests of society, victims, and witnesses are served by according finality to convictions reached after trials that, though imperfect, were not infected by materially prejudicial error. See *Hasting*, 461 U.S. at 507.

The purposes of the joinder rules, to "conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial" (*Bruton*, 391 U.S. at 134), are fully consistent with the goals of the harmless error doctrine—both are designed to promote efficiency without sacrificing the rights of defendants. See *Parker* v. *United States*, 404 F.2d 1193, 1196 (9th Cir. 1968) (footnote omitted), cert. denied, 394 U.S. 1004 (1969) (joinder "expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries, and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once"); *United States* v. *Werner*, 620 F.2d 922, 928 (2d Cir. 1980) ("trial convenience and economy of judicial and prosecutorial resources [are] considerations of particular weight when the Government and the courts have been placed under strict mandate to expedite criminal trials [under the] Speedy Trial Act").

To remove such a significant category of cases as those involving allegations of misjoinder[11] from operation of the harmless error rule would thus be at odds with the intent behind both Rule 52(a) and Rule 8. Indeed, the Court's discussion of the harmless error standard in *Kotteakos* v. *United States*, *supra*, which raised joinder as well as variance issues (328 U.S. at 756 n.6, 774-775), demonstrates the applicability of the harmless error doctrine to violations of Rule 8. The Court in *Kotteakos* clearly assumed that the harmless error requirement is applicable to questions of joinder, for it stated (328 U.S. at 775) that the harmless error statute "carries the threat of overriding the requirement of [the joinder statute] * * *, unless the application of [the harmless error statute] is made with restraint." The Court concluded (*ibid.*) that the harmless error and joinder rules "must be construed and applied so as to bring them into substantial harmony, not into square conflict." That harmony is not achieved by nullifying the harmless error principle, but by scrutinizing cases of misjoinder carefully; but if errors in joinder, like almost any other errors, have not affected the substantial rights of the defendants, re-

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[11] Professor Moore has observed (8 J. Moore, *supra*, ¶ 8.02[1], at 8-2 to 8-3 (footnote omitted)):

> The criteria for joinder of offenses and defendants are spelled out in three deceptively simple sentences of Rule 8. None of the Federal Rules has given rise to so much misunderstanding, yet few of the Rules are so vital.

Certainly the Court should be chary of mandating automatic reversal in an area where error is so common.

versal is improper. In *Schaffer* v. *United States*, 362 U.S. 511, 517 (1960), as in *Kotteakos*, the Court appeared to recognize that the harmless error rule is applicable to improper joinder, though the Court found that the rule "is not even reached * * * since here the joinder was proper under Rule 8(b) and no error was shown." See *United States* v. *Granello*, 365 F.2d 990, 995 (2d Cir. 1966) ("[i]n the *Schaffer* case the Court implied that the harmless error rule is applicable to questions of improper joinder"), cert. denied, 386 U.S. 1019 (1967).

B. There Is No Basis On Which To Except Misjoinder From The Harmless Error Doctrine

1. In *Hasting*, the Court noted that "certain errors may involve 'rights so basic to a fair trial that their infraction can never be treated as harmless error'" (461 U.S. at 508 n.6, quoting *Chapman* v. *California*, 386 U.S. at 23). Such fundamental rights include the right to counsel [12] and the right to an impartial judge.[13] But the joinder standards of Rule 8, which are not even of constitutional magnitude,[14] obviously do not rise to the level of these fundamental rights. Moreover, while improper joinder may give rise to constitutional violations, such as *Bruton* problems, those violations themselves, like other constitutional errors, are subject to the harmless error rule. See *Brown* v. *United States*, 411 U.S. at 231; *Harrington* v. *California*, 395 U.S. at 252-254; see also *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977) (introduction of evidence from unconstitutional identification may be harmless); *Milton* v. *Wainwright*, 407 U.S. at 372 (introduction of improperly obtained confession may be harmless); *Chambers* v. *Maroney*, 399 U.S. 42, 52-53 (1970) (introduction of evidence seized in violation of the Fourth Amendment may be harmless); *Coleman* v. *Alabama*, 399 U.S. 1, 10-11 (1970) (denial of counsel at preliminary hearing may be harmless); *United States* v. *Wade*, 388 U.S. 218, 242 (1967) (tainted in-court identification may be harmless).

Nor is the prejudice that may result from misjoinder so difficult to ascertain that it must be presumed always to be present.[15] Trial courts routinely

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[12] *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

[13] *Tumey* v. *Ohio*, 273 U.S. 510 (1927).

[14] "[N]o federal court has raised misjoinder to an error of constitutional dimension." Note, *Harmless Error and Misjoinder Under the Federal Rules of Criminal Procedure: A Narrowing Division of Opinion*, 6 Hofstra L. Rev. 533, 540 (1978) (footnote omitted). See, *e.g.*, *United States* v. *Seidel*, 620 F.2d at 1013 (misjoinder only "a violation of a mere procedural rule") (footnote omitted); see generally *Schaffer* v. *United States*, 362 U.S. 511 (1960). The Court's discussion of the harmless error standard for nonconstitutional violations in *Kotteakos* v. *United States*, *supra*, further suggests that improper joinder does not, in itself, violate the Constitution. Finally, there is of course no constitutional provision directly addressing joinder. If misjoinder is ever unconstitutional in a particular case, therefore, it could only be because the ensuing prejudice is so great as to deny a defendant a fair trial in contravention of the Fifth Amendment. But where no prejudice has arisen, no constitutional violation could possibly have occurred.

[15] Contrary to defendants' argument (84-744 Br. in Opp. 8), Rules 8 does not represent a determination that a defendant will be prejudiced in every case where its requirements have been contravened in the slightest degree. At most, the Rule is based on a prediction of when, in general, the danger of prejudice will outweigh the gains joinder achieves in trial

inquire into the possible prejudice flowing from joint trials in determining whether to grant a severance under Fed. R. Crim. P. 14,[16] and appellate courts just as routinely perform that inquiry in reviewing Rule 14 rulings. Where the dangers that Rule 8 is designed to guard against have materialized in the form of actual prejudice to a defendant's substantial rights, misjoinder will result in reversal.[17]

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efficiency and convenience. See 8 J. Moore, *supra*, ¶ 8.02. Rule 8 does not speak to the presence of material prejudice in specific cases. Rather, just as Rule 14 allows for severance in a particular case on the grounds of prejudice where Rule 8 permits joinder, Rule 52(a) mandates affirmance in the absence of prejudice where a joint trial has taken place in violation of Rule 8.

[16] Fed. R. Crim. P. 14 provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

[17] The joinder rule is intended in part to avoid "mass trials." See *Ingram* v. *United States*, 272 F.2d at 570-571. But where a defendant has received a fair trial, where he has not been prejudiced by misjoinder, there is no call for reversal. Certainly the avoidance of "mass trials" is not furthered in any sensible way by a rule of automatic reversal for violations of Rule 8. One might just as well urge that the purposes of the hearsay rules or of the Fifth Amendment mandate that all violations of thier standards result in reversal. This Court has of course consistently rejected such an approach, most recently in *Hasting* (461 U.S. at 507):

> The court [of appeals] appears to have decided to deter future similar [prosecutorial] comments by the drastic step of reversal of these convictions. But the interests preserved by the doctrine of harmless error cannot be so lightly and casually ignored in order to chastise what the court viewed as prosecutorial overreaching.

But where a court is confident that no prejudice has arisen—where, for example, the evidence of guilt is overwhelming or the evidence admitted at the joint trial would also be admissible at separate trials—the harmless error rule is appropriately invoked. Those circuits that have applied Rule 52(a) to misjoinder have engaged in the same sort of careful inquiry into the possibility of prejudice that has characterized the proper application of the harmless error rule in other contexts. See, *e.g.*, *United States* v. *Bibby*, 752 F.2d 1116, 1122 (6th Cir. 1985); *United States* v. *Seidel*, 620 F.2d 1006, 1009-1011 (4th Cir. 1980); *United States* v. *Turbide*, 558 F.2d 1053, 1061-1063 (2d Cir.), cert. denied, 434 U.S. 934 (1977); see also 8 J. Moore, *Moore's Federal Practice* ¶ 8.04[2], at 8-18 to 8-19 (2d ed. 1984) (application of Rule 52(a) to misjoinder "is acceptable and even desirable * * *[;] [d]efendants will suffer * * * only if, in the name of 'efficiency,' the [harmless error] doctrine is not carefully and strictly construed").

2. In support of the view that the harmless error standard is inapplicable to misjoinder, defendants argue (84-744 Br. in Opp. 6-7) that application of Rule 52(a) in these circumstances would effectively make Rule 8 redundant with Rule 14, which expressly addresses the issue of prejudicial joinder (see note

16, *supra*). But this fallacious objection misses the crucial fact that the rules are addressed to procedures in the district court, where they are quite clearly distinct in operation: Rule 8 *requires* the court to grant a motion for severance unless its standards are met, without regard to the question of prejudice, while Rule 14 gives the court *discretion* to grant such a motion in the case of joinder that, though proper under Rule 8, is prejudicial. This difference goes to the question whether there has been error at all—an indispensable prerequisite to *any* application of the harmless error rule—not to the quite distinct question whether the error requires setting aside the convictions. Consequently, it is wholly fallacious to contend that the difference in the rules is eviscerated simply because, on appeal, a reviewing court will not set aside a conviction for a violation of Rule 8 in the absence of prejudice.

Moreover, even when Rule 52(a) is applied to violations of Rule 8, an important distinction remains between appellate review of the denial of Rule 8 motions and of those brought under Rule 14: the former are reviewed as a matter of law, with affirmance proper only if the government has carried the burden of establishing the harmlessness of any error, while the latter are reviewed under the highly deferential abuse-of-discretion standard, with the defendant having to shoulder the burden of a clear demonstration of substantial prejudice. For these reasons, Rule 14 cannot be said to create an implicit exception to the application of the harmless error standard with respect to misjoinder. As Judge Friendly stated in *United States* v. *Granello* (365 F.2d at 995), "[w]e see no reason why the undoubted truth that an appeal claiming misjoinder under Rule 8(b) raises a question of law in the strict sense, whereas an appeal from denial of severance under Rule 14 normally raises only one of abuse of discretion, should carry exemption from the harmless error rule * * * as a corollary." See also *United States* v. *Seidel*, 620 F.2d at 1014-1015; *United States* v. *Werner*, 620 F.2d at 926; *Baker* v. *United States*, 401 F.2d 958, 973 (D.C. Cir. 1968).

3. Finally, this Court's decision in *McElroy* v. *United States*, 164 U.S. 76 (1896), while often cited for the proposition that misjoinder is prejudicial per se,[18] in fact does not establish such a rule. In that case, which was decided prior to either the adoption of the Federal Rules of Criminal Procedure in 1946 or the enactment of the harmless error statute in 1919 (see Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181, 28 U.S.C. (1946 ed.) 391)), the government argued that the finding of misjoinder did not require reversal of the convictions of those defendants who had been charged in all counts "because there is nothing in the record to show that they were prejudiced or embarrassed in their defence by the course pursued" (164 U.S. at 81). The Court rejected this argument on the ground that "[i]t cannot be said * * * that all the defendants may not have been embarrassed and prejudiced in their defence, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions" (*ibid.*). Thus, *McElroy* rests upon the conclusion that the misjoinder there might have been prejudicial and so could not be presumed harmless. See *United States* v. *Granello*, 365 F.2d at 995. To whatever extent it might be thought that *McElroy*

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[18] See, *e.g.*, *United States* v. *Turkette*, 632 F.2d at 906 n.35; *United States* v. *Graci*, 504 F.2d at 413.

does establish a rule of per se reversal that survives subsequent legislation barring reversal for harmless errors, the decision should be reexamined in light of the Court's more recent precedents on both the harmless error and the joinder rules (see pages 16-20, *supra*).

C. The Misjoinder Of Count 1 Did Not Prejudice The Rights Of The Defendants

While this Court, if it agrees with us that misjoinder is subject to harmless error evaluation, may prefer to remand to the court of appeals for consideration of the harmfulness of the misjoinder of count 1, we believe there can be no question that it did not materially prejudice defendants' rights in the circumstances of this case.[19] See *Hasting*, 461 U.S. at 510 (this Court has authority to evaluate harmless error claims even where court of appeals has not done so). To begin with, any error in joining count 1 to the others was at most marginal. Although there may not have been a single overarching conspiracy encompassing all three fraudulent arson schemes (see Pet. App. 12a), their close relation in terms of time, method, and participants suggests that it was only the court of appeals' narrow reading of Rule 8 that resulted in its conclusion of misjoinder here.[20]

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[19] Because violation of Rule 8 is not an error of constitutional dimension (see note 14, *supra*), the harmfulness of the error in this case is to be assessed under the normal standard of *Kotteakos* (see 328 U.S. at 764-765) rather than under the strict reasonable-doubt standard established by *Chapman* for constitutional violations.

[20] Although it has been suggested that those circuits that refuse to apply the harmless error rule to misjoinder have, in unacknowledged compensation, broadened the scope of permissible joinder (see Note, *supra*, 6 Hofstra L. Rev. at 563), the court of appeals in this case combined a crabbed reading of Rule 8 with automatic reversal.

Moreover, the testimonial and documentary evidence against defendants, consisting of 29 witnesses, including the Lanes' "torches" (Heard and Lankford) and more than 100 exhibits, was overwhelming and countered by little more than Dennis Lane's denials and J.C. Lane's character defense. There is simply no reasonable probability in light of this evidence that the joinder of count 1 materially contributed to their convictions. See, *e.g.*, *Hastings*, 461 U.S. at 512 (error was harmless in light of the "overwhelming evidence of guilt and the inconsistency of the scanty evidence tendered by the defendants"); *United States* v. *Ong*, 541 F.2d 331, 338 (2d Cir. 1976) ("where untainted evidence of guilt is substantial, a greater demonstration of prejudice from an erroneous failure to sever must be made before the error will be considered to require reversal"). This conclusion is buttressed by the district court's instructions that the evidence in count 1—which was distinct and easily segregated from the evidence relating to the other five counts (see generally *United States* v. *Bibby*, 752 F.2d at 1122)—not be considered against Dennis Lane and that the jury give separate consideration to each defendant and each count (J.A. 21). See, *e.g.*, *United States* v. *Seidel*, 620 F.2d at 1010; *United States* v. *Granello*, 365 F.2d at 995.

Finally, if any doubt remains as to the harmlessness of the joinder of count 1, it is dispelled by consideration of the evidence that would be admissible at separate trials on remand: the new trials of defendants would, in fact, be so substantially similar to

the trial that they have already had that any conclusion of prejudice can only be deemed wholly implausible. At a joint trial of counts 2 through 6, evidence of the El Toro restaurant arson and fraud would still be admissible to establish J.C. Lane's intent or for similar purposes under Fed. R. Evid. 404(b). See, *e.g.*, *United States* v. *Ajlouny*, 629 F.2d 830, 843 (2d Cir. 1980), cert. denied, 449 U.S. 1111 (1981); *United States* v. *Martin*, 567 F.2d 849, 854 (9th Cir. 1977). Defendants would receive limiting instructions just as they did at the trial that has already taken place. Any possibility of transference of guilt is remote in light of the substantial involvement of both defendants and would not be reduced on their joint retrial. See, *e.g.*, *United States* v. *Turbide*, 558 F.2d at 1061; *Baker* v. *United States*, 401 F.2d at 972.[21]

In short, defendants were convicted on overwhelming evidence following a lengthy trial. The court of appeals reversed for a technical violation of the joinder requirements without any determination of the harmfulness of the error. At a time when the criminal justice system is already overburdened,[22] such a

[21] In any event, reversal of J.C. Lane's convictions on counts 2 through 5 is wholly unsupportable, as those counts could have been tried with count 1 (at a trial of J.C. Lane alone) or with count 6 (at a trial with Dennis Lane). Surely, no cognizable prejudice arose simply because counts 2 through 5 were tried with both of the other counts.

[22] Incredibly, defendants argue (84-744 Br. in Opp. 9-10) that application of the harmless error rule will add to the burdens facing the courts. The effort expended by the courts of appeals in assessing the harmfulness of trial errors pales next to the time and resources that must be dedicated to retrials if reversals need not be predicated on actual prejudice to defendants.

result, which does nothing to contribute to the fairness of the process, makes little sense indeed.

II. THE EVIDENCE WAS SUFFICIENT TO SUPPORT DEFENDANTS' CONVICTIONS FOR MAIL FRAUD ON COUNTS 2 THROUGH 4

The court of appeals correctly rejected (Pet. App. 15a-18a) defendants' contention that the evidence was insufficient to show that the mailings charged in counts 2 through 4 of the indictment (J.A. 14-17) were "for the purpose of executing" (18 U.S.C. 1341) their fraudulent scheme. The charged use of the mails need not be "an element" of the scheme. Rather, it is enough that the mailing be "incident to an essential part of the scheme." *Pereira* v. *United States*, 347 U.S. 1, 8 (1954). The evidence at trial, viewed in the light most favorable to the government, see, *e.g.*, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), plainly satisfies this test.

Defendants do not now contend that they did not engage in a scheme to defraud their insurance company by deliberately burning their duplex in order to receive the proceeds of the fire insurance policy. Nor do they deny that the proofs of loss and invoices they caused to be mailed to the company were fraudulent.[23] Rather, they argue only (84-963 Cross-Pet. 4-10) that the mailings could not have been for the purpose of executing their scheme because each mailing took place after they had received the payment from the

[23] A defendant "causes" a mailing under 18 U.S.C. 1341 where the use of the mails "can reasonably be foreseen, even though not actually intended [by him]." *Pereira*, 347 U.S. at 9. Under 18 U.S.C. 2(b), it is of course not necessary that the defendant himself have actually used the mails (347 U.S. at 8).

company relating to the documents mailed. This argument is erroneous both on the facts and on the law.

1. Defendants had not received the proceeds of their fraud when the charged mailings took place. The proof-of-loss forms charged in counts 2 and 3 were mailed well before the final and largest payment on the policy was made in September 1980. These mailings were substantially connected to the last payment, as the proofs of loss (which averred that the loss had not been caused by the insured) related to the entire claim, which was not settled until the September 18, 1980 payment. Indeed, the first payment was only an advance for repairs that purportedly continued until the final settlement (see pages 6-7, *supra*). Moreover, the indictment charged that these mailings were in furtherance of the entire fraudulent scheme relating to the duplex arson, and not merely in furtherance of obtaining the particular payments directly related to the proof-of-loss forms (J.A. 14-16). The scheme obviously was still continuing when the mailings charged in counts 2 and 3 took place. The convictions on these counts are therefore amply supported by the evidence.

Although the September 1980 mailing charged in count 4 took place two days after defendants had received the final draft in payment from the insurance company, they had not yet fully secured the proceeds of that payment at the time of the mailing. Raymond Thompson, the property manager for the insurance company's claims department (Tr. 208), testified that the drafts issued by the company, unlike checks, are not payable on demand but only upon authorization from the home office when they arrive at the company's bank for collection (Tr. 212-213). If "there was something wrong with the claim" (Tr. 218), payment could have been stopped by the company even after the draft had been issued. The cashier at defendants' bank (Tr. 364) testified that if the drafts deposited by defendants had been dishonored by the insurance company's banks, the amounts would have been charged against defendants' account (Tr. 395). Had defendants already withdrawn all or part of the funds, their account would have been put in overdraft status, allowing the bank to recover the funds from defendants (Tr. 396). Accordingly, defendants had not irrevocably received the proceeds of the final payment at the time of the mailing charged in count 4. Had the mailing not taken place, the insurance company could have refused to honor the draft and defendants could not have retained the funds in question. See *United States* v. *MacClain*, 501 F.2d 1006, 1012 (10th Cir. 1974) (mailing was in furtherance of fraudulent scheme where victim could have stopped payment on previously tendered check had mailing not occurred).

2. Even assuming that defendants had obtained the funds in question before each charged mailing, the jury was still entitled to find that the mailings were in furtherance of the fraudulent scheme. There is no per se rule that mailings occurring after payment has been received cannot be "for the purpose of executing" a scheme to defraud under Section 1341. To the contrary, this Court has held that letters designed to lull victims into a false sense of security, postpone their complaints, and delay discovery of the defendants' scheme are within the statute. *United States* v. *Sampson*, 371 U.S. 75 (1962) (subsequent mailings assured victims that the services they had paid for would be performed); see *United States* v. *Maze*, 414 U.S. 395, 403 (1974). The courts of ap-

peals have also consistently upheld convictions under Section 1341 on the theory that subsequent mailings furthered the defendants' schemes because the mailings lulled victims into believing that they had not been defrauded. See, *e.g.*, *United States* v. *Elkin*, 731 F.2d 1005, 1008-1009 (2d Cir. 1984), cert. denied, No. 83-1848 (Oct. 1, 1984); *United States* v. *Jones*, 712 F.2d 1316, 1320 (9th Cir.), cert. denied, 464 U.S. 985 (1983); *United States* v. *Chappell*, 698 F.2d 308, 311 (7th Cir.), cert. denied, 461 U.S. 931 (1983); *United States* v. *Wrehe*, 628 F.2d 1079, 1082-1083 (8th Cir. 1980); *United States* v. *Toney*, 605 F.2d 200, 206-207 (5th Cir. 1979), cert. denied, 444 U.S. 1090 (1980); *United States* v. *Vanderpool*, 528 F.2d 1205, 1207 (4th Cir. 1975), cert. denied, 424 U.S. 922 (1976); *United States* v. *MacClain*, *supra*; *Bliss* v. *United States*, 354 F.2d 456, 457 (8th Cir. 1966) (Blackmun, J.).[24]

The jury was properly instructed in accordance with this theory that mailings "which facilitate concealment of the scheme are mailings in furtherance of the scheme" (J.A. 24), although mailings that occur after "the alleged scheme in its entirety had been completed" do not violate the statute (J.A. 23). See page 11 note 7, *supra*. Under these instructions, the jury could surely have concluded that the scheme had not ended with the September 16, 1980 payment, but continued at least through the September 18 mailing to the insurance company of the fraudulent in-

[24] Cf. *United States* v. *Miller*, 664 F.2d 94, 98 (5th Cir. 1981), cert. denied, 459 U.S. 854 (1982) (co-conspirator's statement made to allay third party's suspicions was in furtherance of conspiracy and therefore admissible under Fed. R. Evid. 801(d)(2)(E)); *United States* v. *Gleason*, 616 F.2d 2, 23 (2d Cir. 1979), cert. denied, 444 U.S. 1082 (1980) (same).

voices that formed the basis for that payment.[25] Defendants can reasonably be charged with having foreseen the subsequent mailing to the insurance company, which followed the company's normal business practice. And the mailing plainly contributed to the success of defendants' scheme; had it not taken place, the company might well have immediately investigated the circumstances of the claimed loss and discovered defendants' fraud. Indeed, following the mailing the company conducted an on-site inspection of the duplex in order to verify defendants' claims and took action in November 1980 to obtain reimbursement when it appeared that some items of the claim were not supported (Tr. 220-221).

The courts of appeals have upheld mail-fraud convictions in similar circumstances. In *United States* v. *Angelilli*, 660 F.2d 23 (2d Cir. 1981), cert. denied, 455 U.S. 910 (1982), the defendants fraudulently appropriated part of the proceeds from the sales of debtors' property and then mailed letters to creditors with the remaining proceeds, falsely stating that the creditors were receiving all of the funds obtained in the sales. The court of appeals reasoned (*id.* at 36-37) that the defendants' subsequent communications with their victims were a necessary part of the scheme that served to lull the creditors into think-

[25] The indictment properly charged that the mailings were "for the purpose of executing" defendants' fraudulent scheme (J.A. 15, 16, 17). There was no need for the indictment to state specifically that the letters were intended to "lull" the insurance company. *Hermansen* v. *United States*, 228 F.2d 495, 499, reh'g denied, 230 F.2d 173 (5th Cir.), cert. denied, 351 U.S. 924 (1956); see also *United States* v. *Buchanan*, 633 F.2d 423, 426 (5th Cir. 1980), cert. denied, 451 U.S. 912 (1981); see generally *United States* v. *Miller*, No. 83-1750 (Apr. 1, 1985), slip op. 6-8.

ing that they had not been defrauded. Here as well, the mailing to the insurance company headquarters was a necessary part of the scheme, without which the company would have taken steps to recover its payments and to investigate the claim (Tr. 215-221). Similarly, in *United States* v. *Shelton*, 669 F.2d 446 (7th Cir.), cert. denied, 456 U.S. 934 (1982), the court of appeals held (669 F.2d at 458) that stock certificates mailed to investors after they had parted with their money were within Section 1341. The stock certificates in *Shelton*, like the proof-of-loss forms and invoices here, represented to the victims the object for which they had expended their funds. Had they not received this evidence of their expenditures, the victims would more likely have initiated action leading to discovery that they had been defrauded. Finally, in *United States* v. *Moss*, 591 F.2d 428 (8th Cir. 1979), the defendant was charged with defrauding an insurance company. Even though the defendant had already obtained an insurance policy, the mailing to him of a policy amendment was held to come within Section 1341. The court of appeals reasoned (591 F.2d at 437) that the company would not have processed claims without the policy amendment, and that its mailing was therefore in furtherance of the scheme to defraud. Here as well, defendants' fraud could not successfully have been perpetrated without mailing of their proof-of-loss forms and invoices to the insurance company. See also cases cited at page 32, *supra*.

United States v. *Maze*, *supra*, is not to the contrary. There, the defendant had fraudulently used a stolen credit card. He was charged with violating Section 1341 on the basis of invoices mailed to the card's issuing bank for payment. The Court rea-

soned (414 U.S. at 403) that the mailings could not have lulled the defendant's victims, but rather "increased the probability that [he] would be detected and apprehended." The defendant "probably would have preferred to have the invoices misplaced * * * and never mailed at all" (*id.* at 402). Here, by contrast, the proof-of-loss forms and invoices served to hide defendants' fraud by making it appear that a legitimate fire and loss had taken place. Had the mailings not occurred, the insurance company would have investigated the matter, increasing the chance of defendants' discovery. This is precisely the opposite of what took place in *Maze*, where the bank would not have been aware of the fraudulent purchases if the invoices had never been mailed to it. Rather, this case is controlled by *United States* v. *Sampson*, *supra*. The subsequent mailings there, like the ones here, "were designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place" (*Maze*, 414 U.S. at 403).[26]

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[26] In *United States* v. *Ledesma*, 632 F.2d 670 (7th Cir.), cert. denied, 449 U.S. 998 (1980), the court of appeals erroneously relied on *Maze* in holding (632 F.2d at 677-678) that the mailing of a proof-of-loss form after receipt of the insurance company's check did not violate Section 1341. The court of appeals failed to discuss *Sampson* and only adverted (without discussion) to the possibility that subsequent mailings may conceal a fraud (632 F.2d at 677-678 n.11). Nor did the court mention the possibility that payment on the check could have been stopped or the funds recovered by the insurance company. To our knowledge, neither the Seventh Circuit nor any other court of appeals has ever relied on *Ledesma* to reverse a conviction under Section 1341. To the contrary, the

No sound policy supports defendants' proposed limitation on the mail fraud statute. Certainly mailings that further a fraudulent scheme but occur after funds have been obtained are no less a danger to the public or a misuse of the Post Office than are similar mailings that take place before victims have parted with their money. Nor does the "lulling" theory render the statutory language a nullity—both this Court and the courts of appeals have reversed convictions because mailings were not made "for the purpose of executing" a scheme to defraud, while recognizing the validity of the doctrine that subsequent mailings may violate the statute. See, *e.g.*, *United States* v. *Maze*, *supra*; *Gordon* v. *United States*, 358 F.2d 112, 114-115 (5th Cir. 1966). Finally, it is important that Section 1341, "traditionally * * * a first line of defense" against fraudulent activity (*Maze*, 414 U.S. at 405 (Burger, C.J., dissenting)), be preserved at least in the full scope of its historic reach against all uses of the mail that further fraudulent schemes. There is no justification for allowing "the ever-inventive American 'con artist'" (*id.* at 407 (Burger, C.J., dissenting)) such a broad exemption from the statutory prohibition as defendants seek to establish.

Seventh Circuit, like the other courts of appeals, has repeatedly affirmed the viability of the lulling theory at issue here. See, *e.g.*, *United States* v. *Chappell*, 698 F.2d at 311; *United States* v. *Shelton*, 669 F.2d at 458.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it holds that the misjoinder of count 1 was reversible error and affirmed insofar as it holds that the evidence was sufficient to support respondents' convictions on counts 2 through 4.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1984

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NO. 84-744
UNITED STATES OF AMERICA, PETITIONER
v.
JAMES C. LANE AND DENNIS R. LANE

NO. 84-963
JAMES C. LANE AND DENNIS R. LANE,
PETITIONERS
v.
UNITED STATES OF AMERICA

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENT-CROSS-PETITIONERS

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in reversing defendants' convictions on the basis of misjoinder under Rule 8 of the Federal Rules of Criminal Procedure without determining whether the misjoinder constituted harmless error.

2. Whether there was sufficient evidence to support defendants' convictions for mail fraud under 18 U.S.C. 1341.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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BRIEF FOR THE RESPONDENT-CROSS-PETITIONERS

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a)[1] is reported at 735 F.2d 799.

[1] The appendices to each petition are identical.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21a) was entered on June 18, 1984. A petition for rehearing was denied on August 22, 1984 (Pet. App. 22a-23a). On October 11, 1984, Justice White extended the time in which to file the government's petition for a writ of certiorari to November 20, 1984, and the petition was filed on November 6, 1984. The defendants' cross-petition for a writ of certiorari was filed on December 7, 1984. The petitions were granted on February 19, 1985 (J.A. 25, 26). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND RULES INVOLVED

18 U.S.C. 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Fed. R. Crim. P. 8 provides:

> (a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series or acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Fed. R. Crim. P. 52(a) provides:

> Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

STATEMENT

Respondent-Cross-Petitioners adopt, for the purpose of this brief, the contents of the Government's Brief under the heading, "Statement".

SUMMARY OF ARGUMENT

The Government, relying upon *United States v. Hasting,* 461 U.S. 499 (1983), argues that the Harmless Error Rule applies to violations of Rule 8(b), and that "there is no basis on which to except misjoinder from the harmless error doctrine." Respondents, however, rely on this Court's decision in *McElroy v. United States,* 164 U.S. 76 (1896), and contend that there are legitimate reasons to consider misjoinder *per se* reversible error without regard to Rule 52(a). Although "it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless," misjoinder is inherently prejudicial and is so likely to prejudice the accused that the cost of litigating its effect in a particular case is unjustified.

In *McElroy v United States, supra,* this Court established a *per se* rule of prejudice arising from misjoinder. This rule is based on the inherent prejudice of misjoinder and the impossibility of determining, even retrospectively, that a defendant was not prejudiced by such error. The *McElroy* analysis of misjoinder is consistent with the rules of harmless error announced by this Court in *Chapman v. California,* 386 U.S. 18 (1967) and *Kotteakos v. United States,* 328 U.S. 750 (1946), as the risk of prejudice in the case of misjoinder is so great that it is logically impossible to declare the error harmless, and the judicial cost of reviewing the effect of misjoinder in particular cases is unjustified.

Although joinder of offenses promotes judicial economy, this benefit is outweighed by the inherent prejudice of misjoinder. Rule 8(b) of the Federal Rules of Criminal Procedure balances the competing considerations of judicial economy and presumptive prejudice from joinder. Rule 8 set the limits of tolerance beyond which the danger of prejudice outweighs the benefit, and any joinder

which does not fall within Rule 8 is *per se* impermissible. Rule 8 is a final determination, by the rule-making authority, of the permissible limits of joinder, and those competing interests should not be continually re-evaluated under the harmless error rule. Construction for which the Government contends would bring Rule 8 and Rule 52 into square conflict, rendering Rule 8 redundant of Rule 14. Such construction would result in an internal inconsistency within the rules, an unreasonable construction. The two sections must be construed and applied so as to bring them into substantial harmony, not square conflict.

Misjoinder is a violation of a substantial right, and therefore is an exception to Rule 52(a), and cannot be ignored. The Government contends that there is no basis on which to except misjoinder from the harmless error doctrine. However, Rule 52, by its own terms, has no application to violation of substantial rights. In *Kotteakos v. United States, supra,* this Court held that misjoinder is a violation of a substantial right, the right not to be tried *en masse.*

Rule 8 protects a goal of the judicial system independent of the judgment. The Rule protects a substantial right to an individual, personal determination of guilt or innocence and protects the individual's right to be free from governmental imposition and the incidental burdens of defending a criminal accusation. As Rule 8 promotes judicial goals independent of the factual validity of the judgment, application of the harmless error rule to misjoinder is inappropriate. Misjoinder in violation of Rule 8 calls for a *per se,* automatic reversal, not alone because of the factual prejudice to an individual defendant, but for the deterrent affect such a reversal and for the purpose of promoting obedience to the Rule.

Cross-Petitioners contend that the evidence is insufficient to support their convictions for Counts 2 through 4

of the Indictment. In order to convict the Cross-Petitioners on these Counts it is necessary for the Government to prove that the alleged use of the mail was for the purpose of executing a scheme or artifice to defraud. The use of the mails cannot be for the purpose of executing such a scheme as alleged in the Indictment, if the alleged mailings occurred after the scheme had reached its fruition. As the Cross-Petitioners irrevocably received the funds alleged in the Indictment as a part of the scheme, prior to the mailing alleged in the Indictment, they cannot be convicted of Counts 2 through 4 because such mailings were not for the purpose of executing the scheme. The scheme alleged in Counts 2 through 4 of the Indictment had reached fruition by the irrevocable delivery of the object funds from the insurance company to the Cross-Petitioners prior to the mailings alleged in the various Counts of the Indictment.

The facts of this case are substantially identical and indistinguishable from the facts in the case of *U.S. v. Ledesma,* 632 F.2d 670 (7th Cir. 1980). The Court of Appeals did not distinguish that the *Ledesma* case from the case at bar. Rather, relying upon *United States v. Shaid,* 730 F.2d 225 (5th Cir. 1984), and *United States v. Sampson,* 371 U.S. 75 (1962), and confusing foreseeability with intent, the Court of Appeals ruled that the Cross-Petitioners caused the use of the mails, and extended this foreseeable causation to a conclusion that the Cross-Petitioners intended to "lull" the defrauded insurance company by the use of the mails.

The case at bar is factually distinguishable from *United States v. Sampson,* 371 U.S. 75 (1962), relied upon by the Fifth Circuit Court of Appeals. In *Sampson* the indictment specifically alleged the lulling purpose and intent of the mailings. The intent to lull was a preconceived portion of the scheme in *Sampson.* This premeditated, calculated

intent to use the mails to lull, as alleged in *Sampson,* is absent from the facts in the case at bar.

The Court of Appeals has confused the foreseeability of mailing with the preconceived intent to lull by use of the mails. While is is true that the foreseeability of mailing justifies the conclusion that the defendant causes the mailing, this does not justify conclusion of an intent to use the mails. This confuses the *actus reus* element of a criminal offense with the required *mens rea,* intent. While it may be said that the Cross-Petitioners through their actions caused the mailings, the conclusion does not follow that they preconceived the use of the mail or intended to lull their victims. Proof of the *actus reas* of knowingly causing the use of the mails does not prove, nor substitute for proof of, an intent to lull. The evidence therefore is insufficient to prove that the Cross-Petitioners in fact intended a lulling use of the mails, and therefore the evidence is insufficient to prove that their use of the mails was for the purpose of executing a scheme. Accordingly, the evidence is insufficient to support their conviction on Counts 2 through 4 of the Indictment.

I. THE HARMLESS ERROR RULE IS INAPPLICABLE TO MISJOINDER

The Court of Appeals reversed the Respondents' convictions because of misjoinder in violation of Rule 8(b) of the Federal Rules of Criminal Procedure, ruling that "misjoinder is prejudicial *per se.*" *Lane v. United States,* 735 F.2d 799 (5th Cir. 1984). The Government contends that "a conviction may not be reversed on the basis of misjoinder under Rule 8 of the Federal Rules of Criminal Procedure if the error was harmless." (Brief For The United States, p. 14.) Accordingly, the question presented by this case is whether the Court of Appeals erred in reversing without determining whether the mis-

joinder constituted harmless error. Is the harmless error rule of Rule 52(a) of the Federal Rules of Criminal Procedure applicable to violations of Rule 8(b), or is misjoinder *per se* reversible? The Government, relying upon *United States v. Hasting,* 461 U.S. 499, 590 (1983), argues that Rule 52(a) applies to misjoinder in violation of Rule 8(b), and that "there is no basis on which to except misjoinder from the harmless error doctrine." (Brief For The United States, p.20.) Respondents, however, rely on this Court's decision in *McElroy v. United States,* 164 U.S. 76, 17 S.Ct. 31, 41 L.Ed. 355, (1896), and contend that there are legitimate reasons to consider misjoinder *per se* reversible error without regard to Rule 52(a). Misjoinder is inherently prejudicial and violates a substantial right of a criminal defendant protected by Rule 8(b) of the Federal Rules of Criminal Procedure. Respondents contend that misjoinder in violation of Rule 8(b) of the Federal Rules of Criminal Procedure is *per se* reversible error, which cannot be deemed harmless.

A. Misjoinder In Violation Of Rule 8 (b) is Per Se Reversible Error Which Cannot Be Harmless.

The Government, relying upon *Hasting,* argues that "it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless." (Brief For The United States, p. 17). "There are, however circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States v. Cronic,* _____ U.S. _____, 104 S.Ct. 2039 at 2046-47 (1984). In the case of some types of errors, "[p]rejudice . . . is so likely that case by case inquiry into prejudice is not worth the cost." *Strickland v. Washington,* _____ U.S. _____, 104 S.Ct. 2052 at 2067 (1984). The Government seems to believe that this case is governed by *Hasting,* and that

misjoinder is not exempt from harmless error review. (*Id.* at 20.) *Hasting* stated a general principle requiring harmless error review in those cases involving errors which may in fact be harmless, but *Hasting* did not create a blanket rule requiring appellate determination of prejudice with regard to every conceivable type of error. *Hasting* recognized that some errors can never be harmless, and therefore are not subject to Rule 52(a). *See also United States v. Cronic, supra; Strickland v. Washington, supra.* Misjoinder in violation of Rule 8(b) is such an error.

In *McElroy v. United States, supra,* this Court established a *per se* rule of prejudice arising from misjoinder. This rule is based upon the inherent prejudice of misjoinder and the impossibility of determining, even retrospectively, that a defendant was not prejudiced by such error. Interpreting the statutory forerunner of Rule 8, and ruling upon an assertion of harmless error from misjoinder, this Court observed that

> [i]t cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defence, or that the attention of the jury may not have been distracted to their injury in passing upon the distinct and independent transaction. The order of consolidation was not authorized by statute and did not rest in mere discretion.

McElroy v. United States, supra, at 81, 17 S.Ct. at 33. This same view was reinforced by Chief Justice Burger when writing as Circuit Judge in *Ward v. United States,* 289 F.2d 877 (D.C. Cir. 1961). Relying on the *McElroy* case, he observed:

> . . . [W]here multiple defendants are charged with offenses in no way connected, and are tried together, they are prejudiced by that very fact, and the trial judge has no discretion to deny relief. *Ingram v. United*

States, 272 F.2d 567, 570 (4th Cir. 1959). *See also* Schaffer v. United States, 362 U.S. 511, 80 S.Ct. 945, 4 L.Ed. 921 (1960); *McElroy v. United States,* 164 U.S. 76, 17 S.Ct. 31, 41 L.Ed 355 (1896); *United States v. Welch,* 15 F.R.D. 189, 190 (D.C. 1953).

Ward v. United States, supra, at 878. The cases holding that misjoinder cannot be harmless error have relied on *McElroy,* its reasoning and language. *See* 1 C. Wright *Federal Practice and Procedure,* §145, p. 530 n. 24 (2nd Ed. 1982).

The Government takes the position that *McElroy,* "while often cited for the proposition that misjoinder is prejudicial *per se,* in fact does not establish such a rule." Brief for the United States, at 25). Relying on *United States v. Granello,* 365 F.2d 990 at 995 (2nd Cir. 1966), the Government argues that *McElroy* is limited to its facts. To the contrary, the decision in *McElroy* clearly declares the inherent prejudice in misjoinder and the factual and logical impossibility of disproving prejudice "in such cases." This Court, in a global statement of the logical underpinnings of Rule 8, stated that "it cannot be said *in such case* that all the defendants may not have been embarrassed and prejudiced in their defence (sic) . . .". *McElroy v. United States, supra* at 81, 17 S.Ct. at 33. (Emphasis added). The language in *McElroy* indicates a *per se* rule of prejudice from misjoinder, and there is no indication that the rule was limited to the facts of that case. The rule of *per se* prejudice is a logical conclusion flowing from the factual and logical impossibility of disproving prejudice "in such case."

The *McElroy* analysis of misjoinder is consistent with the rules of harmless error announced by this Court in *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and *Kotteakos v. United States,* 328 U.S. 750 (1946). In describing the standard of review for

harmless error, this Court has stated that

> [i]f, when all is said and done, the conviction is sure that the error did not influence the jury, or had but a very slight effect, the verdict and the judgement should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress.
>
> . . .
>
> But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgement was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.

Kotteakos v. United States, supra at 764-765. Later, in announcing the standard of review for harmless *constitutional* error, the Court ruled that for an error to be harmless, it must have made no contribution to a criminal conviction. *Chapman v. California, supra.* "The question is whether there is a reasonable *possibility* that the evidence complained of might have contributed to the conviction." *Chapman v. California, supra* at 23, 87 S.Ct. at 827 (Emphasis added). In light of this standard of review, it is clear that misjoinder can never be harmless, as it is impossible to conclude that the error did not influence the jury, and in such cases, it is impossible to declare a belief beyond a reasonable doubt, that the error "made no contribution to . . . conviction." The risk of prejudice is so great that it is logically impossible to declare the error harmless.

B. There Are Substantial Reasons To Except Misjoinder From The Harmless Error Doctrine

1. *Misjoinder is inherently prejudicial.*

Contrary to the assertion of the Government, there is a reasonable basis upon which to except misjoinder from the harmless error doctrine. Improper joinder in violation of

Rule 8(b) is inherently prejudicial. *McElroy v. United States, supra* at 80, 17 S.Ct. at 32; *Lane v. United States,* 735 F.2d 799 (5th Cir. 1984); *United States v. Dennis,* 645 F.2d 517 (5th Cir 1981); *United States v. Marionneaux,* 514 F.2d 1244 (5th Cir. 1975). "A risk of prejudice, either from evidentiary spillover or transference of guilt, inheres in any joinder of offenses or defendants." *King v. United States,* 355 F.2d 700, 703 (1st Cir. 1966). "The dangers of transference of guilt from one to another . . . subconsciously or otherwise, are so great that no one really can say prejudice to substantial rights" does not occur with misjoinder. *Kotteakos v. United States,* 328 U.S. 750 at 774, 66 S.Ct. 1239 at 1252, 90 L.Ed.2d 1557 (1946). "Because of the natural tendency to infer guilt by association, a defendant may suffer by being joined with another allegedly 'bad man'." *King v. United States, supra* at 704. Because misjoinder occurs under Rule 8(b) when a defendant is joined in an indictment containing charges that are unrelated to that defendant, there is a temptation to find that the trier of fact was able to keep the unrelated charge separated from the question of a particular defendant's guilt, and that misjoinder was therefore harmless. However, to apply this reasoning would nullify the requirements of Rule 8(b). *United States v. Hatcher,* 680 F.2d 438 at 442 (6th Cir. 1982). "When unrelated transactions involving several defendants are joined together . . . [t]he result is an inherent prejudice that no form of limiting instruction or cautionary charge could absolve . . . ." *United States v. Levine,* 546 F.2d 658 at 662 (5th Cir. 1977).

Joinder of offenses or parties has the salutory effect of promoting judicial economy. (*See* Brief For The United States, p. 18.) Rule 8 balances the competing considerations of the benefit to the court, prosecution, and the public with the presumptive prejudice inherent in the col-

solidation of parties or offenses by permitting joinder if certain requirements are met. Rule 8 "set the limits of tolerance" beyond which the danger of prejudice outweighs the benefit, and any joinder which does not fall within Rule 8 "is *per se* impermissible." *King v. United States, supra; United States v. Turkett,* 632 F.2d 896, reversed 452 U.S. 576. Rule 8 is a final determination, by the rule-making authority, of the permissible limits of joinder, *King v. United States, supra,* and these competing interests should not be continually re-evaluated under the harmless error rule. *See Kotteakos, v. United States, supra* at 773. For the Federal courts to engage in the same weighing and comparison of the competing interests of prejudice and judicial economy in each case of misjoinder, as requested by the government, would be inconsistent with Rules 8 and 14, and their history and purposes. In the case of joinder, Rules 8 and 14 perform the function of Rule 52(a).

Further, the construction for which the Government contends would bring Rule 8 and Rule 52 into square conflict, and would potentially eviscerate Rule 8, rendering it redundant of Rule 14. Certainly the rule-making authority intended no such construction and "the two sections must be construed and applied so as to bring them into substantial harmony, not into square conflict." *Kotteakos v. United States, supra* at 775, 66 S.Ct. at 1252-1253. Such an internal inconsistency in the Rules of Criminal Procedure is not a reasonable construction of the intent of the rule-making authority. As Professor Charles Wright has observed:

> Indeed there would be no point in having Rule 8 if the harmless error concept were held applicable to it. If that concept could be applied, then defendant could obtain reversal only if the joinder were prejudicial to him. But Rule 14 provides for relief from prejudicial joinder, and a defendant can obtain a reversal, in theory at least, if

he has been prejudiced even though the joinder was proper. If misjoinder can be regarded as harmless error, then reversal could be had only for prejudice whether the initial joinder was proper or improper. If that were true, it would be pointless to define in Rule 8 the limits on joinder, since it would no longer be of significance whether those limits were complied with, and the draftsman would have been better advised to allow the unlimited joinder of offenses and defendants, subject to the power of the court to give relief if the joinder were prejudicial.

1 C. Wright, *Federal Practice and Procedure,* 329 (1969). In his current edition, Professor Wright again reviews the question presented in this case, and acknowledging that "there is now a significant body of authority holding that misjoinder was harmless error," nevertheless concludes that "there remains much to be said for what was once the almost unanimous view that misjoinder is never harmless error." 1 C. Wright, *Federal Practice and Procedure: Criminal,* §145 at 531-532, (2d ed. 1982).

The Government proposes the application of Rule 52(a) to misjoinder, so the appellate courts will be required to engage "in the same sort of careful inquiry into the possibility of prejudice that is characterized in the proper application of the harmless-error rule in other contexts," a rule that would require appeal courts to "undertake the same examination with respect to Rule 8" as applied in reviewing complaints of prejudicial joinder and abuse of discretion under Rule 14. This construction would necessitate case-by-case, laborious, tedious, time consuming study of trial evidence by the reviewing court. But the Federal Courts are "far too busy to be spending countless hours reviewing trial transcripts in an effort to determine the likelihood that error may have affected a jury's deliberations." *United States v. Hasting, supra;* (STEVENS, J., concurring). "A defendant's liberty should not so often depend upon . . . [this Court's] struggle with the particular circumstances of a case to determine from a cold record whether or not the . . . [error was] . . . harmless." *United States v. Hasting, supra* at 1990 n.6 (BRENNAN, J., concurring in part and dissenting in part) quoting *United States v. Rodriguez,* 627 F.2d 110 (7th Cir. 1980). [P]rejudice in . . . [some] circumstances is so likely that case by case inquiry into prejudice is not worth the cost." *Strickland v. Washington, supra* at 696.

2. *Misjoinder is a violation of a substantial right, an exception to Rule 52(a), and cannot be ignored.*

The Government contends that "there is no basis on which to except misjoinder from the harmless error doctrine." (Brief For The United States, at 20). However, Rule 52, by its own terms, has no application to violation of "substantial rights." Respondents contend that Rule 8 grants and protects a substantial right against mass trials, and therefore is an exception to the harmless error rule.

The harmless error doctrine embodied in Rule 52(a) is derived from former statutes.

> The language of these statutes emphasizes their limitation to matters of form and technicality. The early cases so held. There was a general reticence to apply the doctrine more broadly; in fact, in drafting Section 269 of the Judicial Code, the predecessor of the present rule, there was great hesitation in the Senate as to whether the doctrine should be applied to criminal cases at all.

Note, *Harmless Error and Misjoinder Under the Federal Rules of Criminal Procedure: A Narrowing Division of Opinion,* 6 Hofstra L.Rev. 533 at 539 (1978). The purpose of the Rule in its final statutory for was authoritatively stated to be

> [t]o cast upon the party seeking a new trial the burden of showing that any technical errors that he may complain of have affected his substantial rights, otherwise they are to be disregarded. [But] [t]he . . . legislation affects

> only technical errors. If the error is of such a character that the natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will, notwithstanding this legislation, rest upon the one who claims under it.

H. R. Rep. No. 913, 65th Cong. 3d Sess., 1; *Kotteakos v. United States, supra* at 760. The doctrine embodied in the present law has evolved from one governing "technical errors" and "errors of form" to one which is now held applicable to errors of all kinds, including errors of constitutional dimension. *Note, Harmless Error and Misjoinder Under the Federal Rules of Criminal Procedure: A Narrowing Division of Opinion,* 6 Hofstra Law Review, 533 at 540 (1978). But Rule 52(a) by its own terms still does not apply to errors affecting "substantial rights." *Id.*, at 540. Therefore, in addressing the question presented, this Court must determine whether misjoinder in violation of Rule 8(b) is a mere "technical error," or affects "substantial rights." *Id.*, at 540.

Respondents contend that Rule 8 confers, and is intended to protect, a substantial right of an individual accused of a crime. But what are substantial rights as opposed to mere technicality and form? Respondents contend that a constitutional or statutory right, privilege or procedure, granted to individuals for the purpose of protecting the integrity of the fact-finding process, or for the purpose of promoting independent goals of the criminal justice system, may constitute "substantial rights." Rule 8 is such a rule.

This Court has recognized that errors which constitute departure from a "specific command of Congress" are possible exceptions to the harmless error rule. *Kotteakos v. United States, supra* at 764-765; *Bruno v. United States,* 308 U.S. 287 at 294 (1939). Analyzing the legislative history of the harmless error rule, this Court has remarked

that

> the act was intended to prevent matter concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict. Of a very diferent order of importance is the right of an accused to insist on a privilege which Congress has given him.

Bruno v. United States, supra at 294. Rule 8 constitutes a "statutory right expressly conferred," a substantial right, which carries the force of a "specific command of Congress." In *Kotteakos* the Court held that misjoinder did affect "the substantial rights of the parties. . . .

> That right, in each instance, was the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others as shown by this record.

Kotteakos, supra at 775, 66 S.Ct. at 1253. Rule 8 is an enactment of this Court under the rule-making authority delegated by Congress under Title 18, U.S.C. §3771. As such, it constitutes "a specific command," with the authority of Congress under the Necessary and Proper Clause, in furtherance of Article III of the Constitution. *Hanna v. Plumer,* 380 U.S. 460 at 472 (1965). We are dealing with statutory rights expressly conferred. *United States v. Graci,* 504 F.2d 411 at 414 (3rd Cir. 1974); *see Kotteakos v. United States, supra.* Congress has in Rule 8 and Rule 13 defined the permissible scope of joint trials of offenses and offenders. It has in Rule 14 provided a mechanism for protecting against prejudice even within that permissible scope. It seems a strained interpretation of the harmless error statute that it was intended to dilute statutory protections expressly granted. *United States v. Graci, supra* at 414; 1 C. Wright, *Federal Practice and Procedures,* §145 (2nd ed. 1982).

The process which is due to an accused includes rules and procedures designed to protect the integrity of the

fact-finding process and promote the factual accuracy of a verdict and judgment, and provide a trial whose result is reliable. *Strickland v. Washington, supra.* Thus, rules designed to limit or eliminate prejudice are substantial rights. But there are objects of the criminal justice system independent of the factual accuracy of a verdict or judgment.

When the integrity of the fact-finding process and the accuracy and reliability of the verdict and judgment is the substantial right which a rule or procedure is intended to protect, harmless error evaluation is appropriate. In the event that the integrity of the fact-finding process has not been compromised, and there is no possibility that an error could prejudice the accuracy of the judgment, then the defendant's substantial rights have in fact not been harmed, regardless of a breach of the rules intended to protect those rights. In such a case, there is no reason to reverse a doubtlessly valid verdict and judgment merely because of a harmless violation of a rule or procedure intended to protect the factual accuracy of that judgment. However, when the reliability of the verdict is not the sole concern of the rule of procedure which has been violated, and the substantial right granted to the defendant is intended to promote a goal of the judicial system independent of the factual accuracy of the judgment, then harmless error review is inappropriate. In such cases, errors are *per se* reversible, not because the violations of those rules could possibly affect the judgment or sentence, but because the rule is intended to promote a goal of the judicial system independent of the judgment. Such is the case with Rule 8(b).

To be sure, Rule 8(b) is a substantial right in the sense that it is designed to protect the integrity of the fact-finding process and insure the factual accuracy of a verdict and judgment. But, in addition, Rule 8 has the further purpose of protecting a substantial interest, and a goal of

the judicial system independent of the judgment. Rule 8 limits governmental imposition of the burdens of a criminal prosecution on an individual defendant. Rule 8(b) protects the defendant from the burden, time loss, expense, embarrassment and distraction attendant to mounting simultaneous defenses to multiple accusations in a case involving co-defendants. Guilt is both individual and personal. *Kotteakos, supra.* Criminal defendants such as the Respondents have the right to insist upon the judge and jury's undivided attention to the accusations against each of them, and no others. Rule 8(b) is designed to protect and insure that the trial of a criminal accusation is reasonably limited to individual and personal guilt. The Rule protects the substantial right to be free from governmental imposition and the incidental burdens of defending a criminal accusation. Rule 8(b) protects a defendant's substantial right to be left alone and free from the simultaneous defense of multiple, unrelated accusations.

As Rule 8 promotes judicial goals independent of the factual validity of the judgment, application of the harmless error rule to misjoinder is particularly inappropriate. As the purpose of Rule 8 is protection against imposition and mass trials, the factual accuracy and reliability of the judgment is not the sole concern. Therefore the harmless error rule has no application. Misjoinder in violation of Rule 8 calls for *per se,* automatic reversal, not alone because of factual prejudice to an individual defendant, but for the deterrent effect of such a reversal and for the purpose of promoting obedience to Rule 8. In this regard, it is important to recall that Rule 52(a) limits reversal to errors which affect "substantial rights," and is not limited to errors which affect the judgment. Accordingly, Rule 52(a), the harmless error rule, should have no application to misjoinder in violation of Rule 8(b). Rather, misjoinder should result in *per se* reversal, because it is a violation of a substantial right of a

criminal defendant.

The rule against jointly indicting and trying different defendants for unconnected offenses is a long-established procedural safeguard. Its purpose is to prohibit exactly what was done here, namely, allowing evidence in a case against one Defendant to be presented in the case against another charged with a completely dissociated offense, with the danger that the jury might feel that the evidence against the one supported the charge against the other. It is not "harmless error" to violate a fundamental procedural rule designed to prevent "mass trials." *Ingram v. United States,* 272 F.2d 567, 570 (4th Cir. 1959).

II. THE MISJOINDER OF THE RESPONDENTS WAS PREJUDICIAL, NOT HARMLESS

The Government contends that the misjoinder of the Respondent-Cross-Petitioners was harmless, arguing that the "testimonial and documentary evidence against Defendants, . . . was overwhelming," and that there was "no reasonable *probability* in the light of this evidence that the joinder . . . materially contributed to their convictions." (Brief For The United States, p. 27.) In addition, the Government relies upon the District Court's limiting instructions to protect Dennis Lane from prejudice. (*Id.* at 27.) Finally, the Government contends that misjoinder was harmless, arguing that "the new trials of Defendants would, in fact, be so substantially similar to the trial that they have already had that any conclusion of prejudice can only be deemed wholly implausible," and contending that evidence of the misjoined counts "would still be admissible . . . under Federal Rules of Evidence 404(b)." (*Id.* at 27-28.) The reliance of the Government on "overwhelming evidence," limiting instructions, and Rule 404(b) is mistaken. The Respondent-Cross-Petitioners contend that their misjoinder was in fact prejudicial, not harmless.

This Court admonished in *Chapman v. California,*

supra, against giving too much emphasis to "overwhelming evidence" of guilt, stating that errors affecting the substantial rights of the aggrieved party cannot be considered harmless. *See also Harrington v. California,* 395 U.S. 250 at 254, 89 S.Ct. at 1728. Accordingly, the Government's reliance upon "overwhelming evidence" is erroneous. "The question is whether there is a reasonable *possibility* that the . . . [error] complained of might have contributed to the conviction." *Chapman v. California, supra* at 23, 87 S.Ct. at 827 (emphasis added).

> [I]f one cannot say, with fair assurance, . . . that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.

Kotteakos v. United States, supra at 764-765. The question before the Court is not "whether there was sufficient evidence on which . . . [Respondent-Cross-Petitioners] could have been convicted without the . . . [error] complained of. The question is whether there is a reasonable *possibility* that the . . . [error] complained of might have contributed to the conviction." *Fahy v. Connecticut,* 375 U.S. 85 at 86-87, 84 S.Ct. 229, 230, 11 L.Ed.2d 71 (1963). An analysis of harmless error involves more than a determination of sufficiency of the evidence to support conviction, or a determination of the probability of error.

> It is not the Appellate Court's function to determine guilt or innocence . . . Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out . . . The question is, not were [the jury] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision.

Kotteakos v. United States, supra at 763-764, 66 S.Ct. at 1247. The Government's argument that "overwhelming" evidence leaves no "reasonable probability" of error from

misjoinder flies in the face of this Court's decisions in *Chapman v. California, supra,* and *Kotteakos v. United States, supra.*

The Government argues that its conclusion of harmless error "is buttressed by the District Court's instructions" intended to protect Dennis Lane from prejudice from misjoinder. (Brief for the United States, p. 27.) But,

> [w]hen unrelated transactions involving several defendants are joined together . . . [t]he result is an inherent prejudice that no form of limiting instruction or cautionary charge could absolve . . . .

United States v. Levine, supra. (Citations omitted). The very presence of limiting instructions is an implicit recognition of the potential for harm arising from joinder. The limiting instructions in this case may or may not have mitigated the prejudice to Dennis Lane, but their very presence reminds all except the Government of the inherent danger of prejudice from misjoinder. Respondents contend that that misjoinder contributed to their convictions and sentences, despite the limiting instructions.

The Government speculates that the retrial of these Respondents would be "substantially similar" to their previous trial, and based thereon, argues that the error is harmless. This is an erroneous standard of review for the determination of harmless error.

> It is not the appellate court's function to determine guilt or innocence . . . . Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out . . . .

Kotteakos v. United States, supra at 763-764, 66 S.Ct. at 1247. "The question is whether there is a reasonable *possibility* that the evidence complained of might have contributed to the conviction", *Chapman v. California, supra* at 23, 87 S.Ct. at 827, not speculation as to whether or not such error would be permissible upon retrial after

remand and severance. Speculation as to the future outcome of relitigation is irrelevant to a determination of whether or not the error complained of possibly contributed to the Respondents' convictions.

The Government argues that the evidence of misjoined counts introduced below would be admissible on retrial under Rule 404(b) of the Federal Rules of Evidence to show "intent or for similar purposes". (Brief For The United States, p. 28.) It is not at all clear that such evidence would in fact be introduced on retrial. A joint trial requires proof beyond a reasonable doubt, including the full proof of the offenses alleged in the indictment, even with cumulative evidence. But if there is no joinder, but rather separate trials on remand, there would be limited use of the evidence of other crimes solely for the purpose of proving *mens rea,* and not a total trial as in the case of joinder.

> Where evidence of prior criminal acts is proffered, the trial court has discretion to limit, or even to exclude, such evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence . . . . Where multiple offenses are charged in an indictment, however, a trial judge must permit the prosecution to establish each of those offenses beyond a reasonable doubt.

United States v. Satterfield, 548 F.2d 1341 at 1346 (9th Cir. 1977).

Rule 403 permits the District Court to limit the admission of evidence of other acts when their prejudicial effect outweighs their probative value. Evidence of extraneous offenses is not routinely admissible under Rule 404(b), but is subject to the discretion of the Trial Court and its determination of its relative probative value or prejudicial effect. *United States v. Kirk,* 528 F.2d 1057 (5th Cir. 1976);

United States v. Goodwin, 492 F.2d 1141 (5th Cir. 1974). In fact, Rules 105, 403 and 404(b) assume that evidence of extraneous offenses is inherently prejudicial, as those rules require the Court's discretionary consideration of relative prejudice and probative value. Accordingly, it is not possible to conclude that misjoinder could not possibly contribute to conviction. Further, the Government may not at all be correct in its speculation that the District Count on remand would admit evidence of the misjoined counts. The District Judge, in her discretion, excluded some tape recorded evidence of the extraneous offense involved in Count 1 of the Indictment, relying specifically on Rule 403. Clearly, the District Court did in fact exercise its discretion to limit the prejudice from misjoinder, and there is no reason to speculate that the District Court would, upon remand, automatically permit the admission of evidence of extraneous offenses under Rule 404(b). Further, the Defendant's intent may not be a disputed issue of material fact upon remand, and therefore Rule 404(b) may be completely inapplicable and evidence of other offenses completely inadmissible under that rule. *United States v. Kirk, supra,* at 1061. A mere plea of not guilty does not place in issue the intent of the Defendant so as to permit introduction of evidence of similar conduct or crimes. At trial, the defense asserted was that the alleged use of the mails was not in the furtherance of the alleged schemes. If the Defendant does not take the witness stand and does not deny his intent, there is no reason to permit admission of evidence of other offenses under Rule 404(b), and such evidence would be inadmissible. If the Court considers Rule 404(b) evidence admissible regardless of the asserted defense, nevertheless, in the event that there is no dispute as to intent, the prejudicial effect of extraneous offense evidence still greatly outweighs the probative value of that evidence and such evidence should be excluded under Rule

403.

Implicit in the Government's argument is the assumption that remand would result in a severance of counts rather than a severance and separate trial of the Defendants. This conclusion is not at all certain. The error in this case was from misjoinder of *Defendants* in violation of Rule 8(b). The relief which the Respondents requested by their Motion for Severance and Separate Trials was a severance of Defendants, not Counts. On Remand, it would be permissible, and judicially economical, to sever the Defendants for two separate trials. (*See* Brief For The United States, p. 10, n. 5.) If, contrary to the Government's assumption, there is a separate trial of Dennis Lane on remand, absolutely no evidence of Count 1 of the Indictment would be admissible against Dennis. In the event of a joint trial of Counts 2 through 4 upon remand, proof of Count 1 of the Indictment should be excluded under Rule 403 as excessively prejudicial. In the event of a separate trial of J. C. Lane on remand, no evidence of Dennis Lane's perjury, alleged in Count 6, would be admissible against J. C. In the event of a joint trial of Counts 2 through 4 of the Indictment on remand, no evidence of Count 6 should be admissible against either of the Respondents.

Cross-Petitioners contend that they were in fact prejudiced by their misjoinder. The admission of evidence in support of the misjoined Count 1 possibly contributed to the conviction of Dennis Lane on the other Counts. The admission of evidence of the El Toro fire, in Count 1, displayed a picture of one family who had suffered two possibly arson-related fires in their commercial property within a short time span. This seems unlikely in the absence of arson. The very fact that Count 1 was misjoined with the other Counts resulted in this proof of an improbable course of events, which rendered it more likely

that the Respondents had in fact been involved in arson-for-profit in Counts 2 through 5 of the Indictment. In the absence of proof of the arson alleged in Count 1 of the Indictment, the fire relating to Counts 2 through 4 of the Indictment does not appear inherently improbable, and is more likely to appear as the possible result of an unfortunate casualty rather than arson. The additional proof of the arson in Count 1 of the Indictment makes the guilt of the Defendants on Counts 2 through 5 of the Indictment more probable. *Cf.* Fed. R. Cr. Proc. R. 404(b). As a result, it is not possible to declare beyond a reasonable doubt that the error from misjoinder of Count 1 of the Indictment did not contribute to the conviction of the Respondents on the other Counts in the Indictment.

The misjoinder of Count 6 of the Indictment resulted in prejudice to J. C. Lane, and it is not possible to say that proof of the perjury count did not contribute to J. C. Lane's sentence. Proof of Count 1 of the Indictment would tend to show J. C. Lane to be an arsonist involved in mail fraud. Counts 2 through 5 of the Indictment allege that, in addition to his own criminal activity, J. C. Lane actively involved his son in an arson-for-profit conspiracy. But proof of Count 6, Dennis Lane's perjury regarding events surrounding Count 5 of the Indictment, had the damaging effect of making it more likely that both Respondents were in fact guilty of the conspiracy alleged in Count 5. The evidence of perjury is clear evidence of Dennis Lane's knowledge and complicity in the conspiracy alleged in Count 5, and has the effect of making conviction on Counts 1 through 5 much more likely for both Respondents. The jury, having once determined that Dennis Lane was guilty of perjury in Count 6, as concerns statements regarding the conspiracy in Count 5, must necessarily conclude that there was in fact conspiracy as alleged. This proof of perjury breathes substance and

credibility into the allegations of Counts 1 through 5 and presents a clear picture, rather than mere inference, that J. C. Lane had in fact involved his son, Dennis Lane, in his schemes. J. C. Lane's culpability in involving Dennis Lane is blameworthy in addition to his personal criminal activity, and amounts to an aggravating circumstance which may very well have contributed to the sentence which he received. Accordingly, it is not possible to conclude beyond a reasonable doubt that the misjoinder in this case did not contribute to the judgment and sentence. *Cf. Chapman v. California, supra, Kotteakos v. United States, supra.*

III. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION OF THE RESPONDENTS ON COUNTS 2 THROUGH 4 OF THE INDICTMENT

Counts 2 through 4 of the indictment in this case allege the offense of mail fraud for the purpose of defrauding an insurance company and receiving money from that company in payment of fraudulent claims for insurance benefits payable by reason of a fire loss. In order to convict, it is necessary for the Government to prove that the alleged use of the mails was "for the purpose of executing such scheme or artifice" as alleged in the Indictment. 18 U.S.C. §1341. The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by the appropriate state law. *Kann v. U.S.*, 323 U.S. 88 (1944). The use of the mails cannot be "for the purpose of executing such scheme" as alleged in the indictment, if the alleged mailing occurs after the scheme has reached its fruition. *Kann v. U.S., supra.* The Indictment in Counts 2 through 4 alleges that the purpose of the scheme was to defraud the

insurance company and to receive money from the insurance companies. Therefore, if the Cross-Petitioners irrevocably received the funds alleged in the Indictment, prior to the mailing they cannot be convicted of Counts 2 through 4 because such mailings would not be "for the purpose of executing such scheme." *Kann v. U.S., supra; Parr v. U.S.*, 363 U.S. 370 (1960); *U.S. v. Maze*, 414 U.S. 395 (1974).

The facts of this case conclusively show that the schemes alleged in Counts 2 through 4 of the Indictment had reached fruition by the irrevocable delivery of the object funds from the insurance companies to the Defendants prior to the mailings and uses of the mails alleged in the various Counts of the Indictment. The Cross-Petitioners received the alleged checks for insurance money in person, in Amarillo, Texas, from the insurance adjuster who issued those checks personally in Amarillo, Texas and delivered them to the Defendants. The evidence further shows that the Cross-Petitioners deposited those insurance checks to their bank accounts, and that the bank credited their accounts with the funds immediately and irrevocably. All of this occurred prior to the mailing alleged in the Indictment. The Government witness, Mr. Bill Liles, the adjuster for Trinity Universal Insurance Company, the insurance company involved in Counts 2, 3 and 4 of the Indictment, testified that all checks pertinent to Counts 2, 3 and 4 of the Indictment, were delivered in Amarillo, Texas, prior to the mailing of the proofs of loss in relation to said checks.

The evidence in this case concerning Counts 2 through 4 established the allegations concerning the date of delivery of insurance checks to the Cross-Petitioners, and the mailing dates, and as alleged in the Indictment Counts 2 through 4. Nevertheless, it is readily apparent from the Indictment and from the evidence in this case, that all funds

received by Cross-Petitioners were delivered to them in person, in Amarillo, Texas, prior to the mailings alleged in the indictment. The dates of receipts of funds by the Cross-Petitioners, and the date of mailings may be graphically displayed as follows:

Count	Date of Check Receipt	Date of Mailing
COUNT 2	5-9-80	5-15-80
COUNT 3	5-21-80	8-6-80
COUNT 4	5-30-80	9-18-80
	9-16-80	

The facts of this case are substantially identical and indistinguishable from the facts in the case of *U.S. v. Ledesma*, 632 F.2d 670 (7th Cir. 1980). In the *Ledesma* case, the defendant was charged with mail fraud involving a scheme to defraud a casualty insurancy company by submitting a false proof of loss representing the theft of a mobile home. In that case, the claims adjuster testified that he personally delivered the insurance check for the claim to the defendant. Just as in this case, in the *Ledesma* case, the insurance check was signed and issued personally to the defendant and received prior to the mailing of the proof of loss which was alleged as the use of the mails. It was undisputed that the insurance adjuster did not mail the alleged proof of loss until *after* the check was delivered in person. Accordingly, the Seventh Circuit reversed the judgment of conviction in the *Ledesma* case, relying upon *U.S. v. Maze, supra*, and *U.S. v. Rauhoff*, 525 F.2d 1170 (7th Cir. 1975).

The opinion of the Court of Appeals did not distinguish the *Ledesma* case from the case at bar. Rather, noting that in *Ledesma* "the Seventh Circuit relied upon the Supreme Court's reasoning in *United States v. Maze, supra,*" the Court of Appeals undertook to distinguish the *Maze* case from the present case. The Court of Appeals noted that

the use of the mails could have been forseen, stating that

> [w]e have held that when an individual does an act with knowledge that the use of the mails will follow in the ordinary course of business, or when such use can reasonably be foreseen, even though not actually *intended,* then he/she "causes" the mails to be used.

Lane v. U.S. supra; see United States v. Shaid, 730 F.2d 225, 229 (5th Cir. 1984). Based upon this reasoning, and confusing foreseeability with intent, the Court of Appeals ruled that the use of the mails was caused by Cross-Petitioners, and extended this foreseeable causation to a conclusion that the Cross-Petitioners intended to "lull" the defrauded insurance company by the use of the mails. Distinguishing *United States v. Maze, supra,* the Court of Appeals relied on *U.S. v. Sampson, supra,* to rule that the mailings in this case, although occurring after the receipt of fraudulently obtained funds, were in execution of fraud because they were designed to lull the victims into a false sense of security. This is a misconstruction and is in conflict with these applicable decisions of this Court.

The case at bar is factually distinguishable from *United States v. Sampson, supra,* relied upon by the Fifth Circuit Court of Appeals. In *Sampson,* the indictment specifically alleged that the mailings were mailed by the defendants to the victims for the purpose of lulling them by assurances that the promised services would be performed. *U.S. v. Sampson, supra* at 80-81. In *Sampson,*

> [a]lthough the money had already been obtained, the plan still called for a mailing of the accepted application together with a form letter to the victims "for the purpose of lulling said victims by representing that their applications had been accepted and that the defendants would therefore perform for said victims the valuable services which the defendants had falsely and

> fraudulently represented that they would perform." . . .
>
> In short, the indictment alleged that the scheme, as originally planned by the defendants and as actually carried out, included fraudulent activities both before and after the victims had actually given over their money to the defendants.

Id., at 78. This premeditated, calculated *intent* to use the mails to lull, as in *Sampson,* is absent from the facts in the case at bar and in *United States v. Maze, supra.* The intent to lull was a preconceived portion of the scheme in *Sampson.* This is not so in the case at bar. The Court of Appeals has confused the foreseeability of mailing, *see U.S. v. Shaid, supra,* at 229, (5th Cir. 1984), with the preconceived intent to lull by use of the mails. While it is true that the foreseeability of mailing justifies a conclusion that a defendant "caused" the mailing, *U.S. v. Shaid, supra,* this does not justify a conclusion of an intent to use the mails. This confuses the requirement of a voluntary act, or the *actus reus* of the criminal offense, with the required *mens rea* of the criminal offense, intent.

It is a basic principle of federal criminal jurisprudence that all criminal offenses include both elements of mental culpability, or *mens rea,* and the prohibited act, or *actus reus. Morisette v. United States,* 342 U.S. 246 (1952); *Liparota v. United States,* _____ U.S. _____, 105 S.Ct. 2084 (1985). This is of course true of the mail fraud statute, 18 U.S.C. §1341. *Cf. United States v. Stanford,* 589 F. 2d 285 at 295 (7th Cir. 1978); *United States v. Gibson,* 708 F. 2d 344 at 346 (8th Cir. 1983). The required mental state may of course be different for different elements of a crime, and one offense may include both specific and general intent elements, with different culpability for each. *Liparota v. U.S., supra,* at 2087. The general intent element of §1341 is knowledge, *i.e.,* "knowingly" commiting the *actus reus* of mailing or causing the use of

the mails. The *actus reus of* §1341, as alleged in this case, is knowingly causing the mailing. *Pereira v. United States,* 347 U.S. 1 (1954); *Cf. United States v. Stanford, supra.* n. 5 The specific intent *mens rea* of §1341 is the specific intent to defraud, in this case, the disputed intent to "lull", which is the basis of the opinion of the Court of Appeals.

While it may be said that the Cross-Petitioners through their actions caused the mailings, because such was a foreseeable result of their acts, the conclusion does not follow that they preconceived a use of the mail or intended to lull their victims. Rather, as in the case of *U.S. v. Maze,* 414 U.S. 395 (1974), the delivery of the mailed matter was a foreseeable, but unforseen, unplanned, collateral consequence of the scheme. The causation *(actus reas)* element of mail fraud requires only the commission of an act with knowledge that the use of the mails will follow in the ordinary course of business, or when the use can reasonably be foreseen, even though not intended. *Pereira v. United States, supra* at 8-9, 74 S.Ct. at 358. Because a commercial use of the mails is objectively foreseeable in these circumstances, the law will impute to the Respondents the *actus reus* of knowingly causing the mailing even if they did not actually, subjectively, foresee or intend *(mens rea)* the mailing. The statute provides that a defendant must "cause" the use of the mails, but "a defendant will be deemed to have 'caused' the use of the mails . . . if the use was the reasonably foreseeable result of his actions." *United States v. Wrehe,* 628 F.2d 1079, 1085 (8th Cir. 1980). However, this constructive, "deemed", or imputed action does not supply the requisite *mens rea* of intent to "lull".

Foreseeability of mailing is not proof of, nor a substitute for, an intent to defraud nor an intent to "lull". The fraudulent intent necessary to a conviction for violating §1341 must be present at the time the defendant

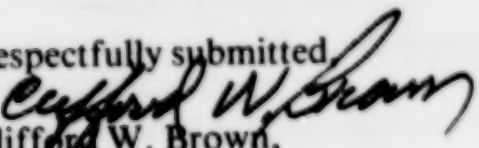
uses the mails or "knowingly causes" the use of the mails by others. *United States v. Gibson,* 708 F.2d 344 at 346 (8th Cir. 1983). The opinion of the Court of Appeals overlooks this basic principle of criminal law and imputes an intent to "lull" which was neither alleged, nor proved, but which was expressly disputed by the Respondent Dennis Lane. As there is insufficient evidence of an intent to "lull", and as this mental culpability can neither be imputed to the Respondents, nor supplied by proof of the *actus reas* alone, it cannot be said that the alleged use of the mails was for the purpose of executing the scheme. Accordingly, the evidence is insufficient to convict the Respondents. The oversight of the Court of Appeals in this regard will not serve to distinguish the case at bar from *Ledesma.*

The decision of the Court of Appeals has misconstrued this Court's opinion in *U.S. v. Sampson, supra,* especially with its interpretation of intent to lull in this case. The scheme reached fruition prior to any use of the mail. The use of the mails alleged in Counts 2, 3 and 4 cannot be, and were not "for the purpose of executing such scheme" as alleged in the Indictment, and therefore, the evidence is legally insufficient to convict the Cross-Petitioners and requires the entry of a judgment of acquittal. *Kann v. U.S., supra; U.S. v. Maze, supra; Parr v. U.S., supra; U.S. v. Ledesma, supra.*

CONCLUSION

The judgment of the court of appeals should be affirmed insofar as it holds that the misjoinder of count 1 was reversible error and reversed insofar as it holds that the evidence was sufficient to support respondents' convictions on counts 2 through 4, and a judgment of acquittal entered on those counts.

Respectfully submitted,



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Nos. 84-744 and 84-963

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES C. LANE AND DENNIS R. LANE

JAMES C. LANE AND DENNIS R. LANE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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1. Defendants argue first (Br. 8-15) that misjoinder is inherently prejudicial and therefore requires automatic reversal of convictions on misjoined counts without an individualized or case-specific examination of actual prejudice. They fail to grasp the significance of Fed. R. Crim. P. 14, which requires both district courts and courts of appeals to ascertain the degree of prejudice resulting from joint trials; if such prejudice were generically impossible to identify, the inquiry would be pointless. While it is undoubtedly true that prejudice is in general more likely when there has been misjoinder than when Rule 8 has been complied with, there is no reason to suppose that the potential harm resulting

from misjoinder in any particular case is qualitatively different from that relevant under Rule 14, thus precluding inquiry into prejudice in one case but not the other. In fact, those courts that have applied the harmless error rule to misjoinder have been well able to identify the factors bearing on whether a verdict was affected by the error, such as the admissibility of evidence at separate trials, the nature of the misjoined counts and the role they played at trial, the presence of limiting instructions, and the quantum of evidence demonstrating the defendant's guilt. See, *e.g., United States* v. *Bibby*, 752 F.2d 1116, 1122 (6th Cir. 1985), petitions for cert. pending, Nos. 84-1692 and 84-1851; *United States* v. *Seidel*, 620 F.2d 1006, 1009-1011 (4th Cir. 1980).

Defendants mistakenly rely on several decisions of this Court. *McElroy* v. *United States*, 164 U.S. 76 (1896), could not have excepted misjoinder from the harmless error rule for the simple reason that no such rule was then in force (see U.S. Br. 25). Nor did *Kotteakos* v. *United States*, 328 U.S. 750 (1946), establish that the "dangers of transference of guilt" (*id.* at 774) are in all cases so great that prejudice must be presumed whenever counts are misjoined. The Court was referring to the facts before it, where at least eight different conspiracies had been proven, and to more egregious circumstances, such as where "a dozen, a score, or more conspiracies and at the same time * * * scores of men [are] involved" (*ibid.*). It contrasted the situation in *Berger* v. *United States*, 295 U.S. 78 (1935), where a variance involving proof of two conspiracies was held to be harmless error, and concluded (328 U.S. at 774) that the line between harmlessness and prejudice lies somewhere between the two extremes. As we explained in our opening brief (at 19), the Court in *Kotteakos*, far from excepting misjoinder from the harmless error rule, assumed that the rule would indeed apply in such cases. Finally, in making the completely fallacious assertion that the harmless error inquiry would expend more judicial resources than would be saved by avoiding unnecessary retrials, defendants quote out of

context (Br. 14) Justice Stevens' opinion concurring in the judgment in *United States* v. *Hasting*, 461 U.S. 499, 516-517 (1983). The Justice did not say that the courts of appeals are too busy to undertake the harmless error inquiry — he stated that this Court is too busy to do so.

2. Defendants argue next (Br. 15-20) that the harmless error inquiry required by Fed. R. Crim. P. 52(a) and 28 U.S.C. 2111 is inapplicable to violations of constitutional or statutory rights. This argument must, if it is to help defendants in this case, mean that the harmless error principle has no application even to violations of the Rules of Criminal Procedure, a far-reaching proposition that would reduce the role of harmless error to insignificance. That such a result is untenable is readily apparent from *Chapman* v. *California*, 386 U.S. 18, 21-22 (1967), where the Court rejected the considerably more modest argument that "all federal constitutional errors * * * must always be deemed harmful" and approved the policy of 28 U.S.C. 2111, which, without "distinguish[ing] between federal constitutional errors and errors [involving] * * * federal statutes and rules," prohibits "setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." Indeed, since *Chapman* the Court has repeatedly held that the harmless error requirement applies to violations of procedural rights afforded by the Constitution or by statute. See, *e.g., United States* v. *Hasting, supra* (prosecutorial comment); *Goldberg* v. *United States*, 425 U.S. 94, 111 (1976) (Jencks Act violations); see also cases cited at U.S. Br. 21.

The question is not, as defendants would have it (Br. 15), whether Fed. R. Crim. P. 8 establishes a "substantial right[]" within the meaning of Fed. R. Crim. P. 52(a) and 28 U.S.C. 2111, but whether any such right has been "affect[ed]" by a violation *that contributed to the jury's*

verdict.[1] See, *e.g.*, *United States* v. *Hasting*, 461 U.S. at 510-511; *United States* v. *Halper*, 590 F.2d 422, 433 (2d Cir. 1978); cf. *United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 15 n.14 (requirement that plain error not only have affected substantial rights but have "had an unfair prejudicial impact on the jury's deliberations" implicitly applied to harmless error rule as well).

Defendants' reliance (Br. 16-17) on *Bruno* v. *United States*, 308 U.S. 287 (1939), is unavailing. In that case the Court stated that the version of 28 U.S.C. 2111 then in effect was simply "intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict." 308 U.S. at 294. As *Chapman* and federal statutory cases such as *Goldberg* demonstrate, however, this description of harmless error doctrine has no continuing validity. Indeed, the version of the harmless error statute to which the remarks in *Bruno* were addressed[2] was repealed in 1948 (62 Stat. 862). When the present version of the harmless error statute was enacted in its place, the adjective "technical" was deleted as a modifier of the word "errors." "[T]hese changes indicate a Congressional intention to emphasize

[1]Contrary to defendants' argument (Br. 18-20), moreover, the joinder rules further no interest on the part of defendants other than the accuracy of the truth-seeking process. See, *e.g.*, *Bruton* v. *United States*, 391 U.S. 123, 131 n.6 (1968). Indeed, the very factors that defendants identify, such as limiting the trial to a determination of personal guilt and guarding against the jury's possible use of evidence against one defendant in considering the guilt or innocence of a co-defendant, are obviously aimed at promoting accurate verdicts.

[2]Act of Feb. 26, 1919, ch. 48, § 1, 40 Stat. 1181. That Act provided in pertinent part:

> On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

the concept that any error not causing detriment should be disregarded." *Brulay* v. *United States*, 383 F.2d 345, 351 (9th Cir.), cert. denied, 389 U.S. 986 (1967); see also *United States* v. *Seidel*, 620 F.2d at 1013; see generally *United States* v. *Hasting*, 461 U.S. at 509-510 n.7.[3]

3. In arguing that the misjoinder here was prejudicial (Br. 20-27), defendants erroneously invoke the standard enunciated in *Chapman* v. *California, supra*, for determining the harmfulness of constitutional errors. As we explained in our opening brief (at 20-21 n.14, 26 n.19), that standard is inapplicable here, because the joinder rule is not of constitutional magnitude. Defendants are also incorrect in claiming that the overwhelming strength of the evidence against them and the presence of limiting instructions are irrelevant to the harmless error analysis. See, *e.g.*, *Hasting*, 461 U.S. at 512; *Harrington* v. *California*, 395 U.S. 250, 254 (1969); *United States* v. *Apodaca*, 666 F.2d 89, 97 (5th Cir.), cert. denied, 459 U.S. 823 (1982); cf. *Francis* v. *Franklin*, No. 83-1590 (Apr. 29, 1985), slip op. 16-17 n.9 (limiting instructions fail to protect defendants only in "extraordinary situations").

Defendants' contention that the same evidence would not be admissible on retrial rests on three mistaken premises. First, they assert (Br. 24) that their intent might not be relevant on retrial. But their pleas of not guilty plainly put intent in issue. See, *e.g.*, *United States* v. *Russo*, 717 F.2d 545, 552 (11th Cir. 1983); *United States* v. *Wagoner*, 713 F.2d 1371, 1375 (8th Cir. 1983); *United States* v. *Roberts*, 619 F.2d 379, 383 (5th Cir. 1980). Second, defendants suggest (Br. 25) that they will be entitled to separate trials on

[3]Defendants' reliance on *Kotteakos* is misplaced in this regard also. Like *Bruno*, on which the Court there relied (328 U.S. at 764-765), *Kotteakos* was decided before both the amendment to the harmless error statute and the Court's decision in *Chapman*.

remand. But the court of appeals made it clear (Pet. App. 13a) that the government would be permitted, if it chose, to try defendants together provided count 1 were severed. That choice, of course, lies initially in the government's discretion. See, *e.g.*, *United States* v. *Rabbitt*, 583 F.2d 1014, 1021 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979) (joinder is permissive, not required); *United States* v. *Gay*, 567 F.2d 916, 919 (9th Cir. 1978) (defendants jointly charged are prima facie to be jointly tried). Third, defendants assume (Br. 25) that they could be jointly tried only on counts 2 through 4. The court of appeals ruled (Pet. App. 13a), however, that only count 1 was misjoined. Defendants could on remand be jointly tried on all of the remaining counts, including the perjury charge against Dennis Lane.

4. Finally, defendants' argument (Br. 27-33) that the evidence was insufficient to support their convictions for mail fraud on counts 2 through 4 rests on both a factual and a legal error. First, defendants claim (Br. 28), without citation to the record, that the funds in question had been irrevocably credited to their bank account before the charged mailings took place. As we pointed out in our opening brief (at 30-31), however, the evidence showed the opposite to be true.

Defendants' sole legal argument apparently is that 18 U.S.C. 1341 requires not only proof of their intent to defraud and of the foreseeable use of the mails in furtherance of their fraudulent scheme, but also proof that they specifically intended the use of the mails. The law is plainly otherwise. In *Pereira* v. *United States*, 347 U.S. 1, 8-9 (1954), the Court held that the charged mailing need be neither "contemplate[d] * * * as an essential element" of the fraudulent scheme nor "actually intended" by the defendant so long as it could "reasonably be foreseen." The mens rea required by Section 1341 is simply the intent to defraud, not the intent to defraud by using the mails. See

United States v. *Reed*, 721 F.2d 1059, 1060 (6th Cir. 1984) ("specific intent to use [the] mails is not necessary"). Because the charged mailings here were foreseeable and furthered defendants' scheme, they are within the statute. Moreover, defendants harbored the requisite intent to defraud at the time that they caused the mailings by submitting false claims to the insurance adjuster. Nothing more is required.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed insofar as it holds that the misjoinder of count 1 was reversible error and affirmed insofar as it holds that the evidence was sufficient to support defendants' convictions on counts 2 through 4.

Respectfully submitted.

CHARLES FRIED
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AUGUST 1985